

JUL 29 2004

REPORT DOCUMENTATION PAGE			Form Approved OMB No. 0704-0188	
Public reporting burden for this collection of information is estimated to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Washington Headquarters Services, Directorate for Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202-4302, and to the Office of Management and Budget, Paperwork Reduction Project (0704-0188), Washington, DC 20503.				
1. AGENCY USE ONLY (Leave blank)		2. REPORT DATE 28.Jul.04		3. REPORT TYPE AND DATES COVERED THESIS
4. TITLE AND SUBTITLE WALMART - SELLING OUT AMERICAN WORKERS			5. FUNDING NUMBERS	
6. AUTHOR(S) MAJ KIRKPATRICK ARTHUR G				
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) THE GEORGE WASHINGTON UNIVERSITY			8. PERFORMING ORGANIZATION REPORT NUMBER CI04-540	
9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES) THE DEPARTMENT OF THE AIR FORCE AFIT/CIA, BLDG 125 2950 P STREET WPAFB OH 45433			10. SPONSORING/MONITORING AGENCY REPORT NUMBER	
11. SUPPLEMENTARY NOTES				
12a. DISTRIBUTION AVAILABILITY STATEMENT Unlimited distribution In Accordance With AFI 35-205/AFIT SD			12b. DISTRIBUTION CODE	
<div style="text-align: center;"> DISTRIBUTION STATEMENT A Approved for Public Release Distribution Unlimited </div>				
13. ABSTRACT (Maximum 200 words)				
20040806 005				
14. SUBJECT TERMS			15. NUMBER OF PAGES 94	
			16. PRICE CODE	
17. SECURITY CLASSIFICATION OF REPORT	18. SECURITY CLASSIFICATION OF THIS PAGE	19. SECURITY CLASSIFICATION OF ABSTRACT	20. LIMITATION OF ABSTRACT	

The views expressed in this article are those of the author and do not reflect the official policy or position of the United States Air Force, Department of Defense, or the U. S. Government.

Wal-Mart - Selling Out American Workers

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A Thesis Submitted to

The Faculty of

The George Washington University Law School

in partial satisfaction of the requirements

for the degree of Master of Laws

July 6, 2004

DISTRIBUTION STATEMENT A

Approved for Public Release

Thesis directed by Distribution Unlimited

Charles B. Craver

Professor of Law

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INTRODUCTION - Wal-Mart - Selling Out American Workers

When General Motors was the nation's largest and most emulated employer, there was truth to the famous assertion by Charles Wilson, General Motors President from 1941 to 1953, that what was good for General Motors was good for the country.¹ In the decades following World War II, the United States was an unmatched industrial power and many of its workers reaped the benefits. Manufacturing jobs in the U.S., which generally provided good pay and benefits, made up 35 percent of America's workforce in 1953.² Jobs were plentiful and so were profits. General Motors brought prosperity to factory towns and made American workers the envy of the world. With a high-wage union job, an assembly-line worker could afford a house, a decent car, received health care benefits and even had a pension.

Today, things are very different for the American worker. Manufacturing jobs now represent less than 12 percent of all U.S. employment.³ Service industries now employ about three quarters of the workforce, with many workers trapped in low-wage, dead-end jobs.⁴ Instead of General Motors, Wal-Mart is America's largest employer with 1.2 million U.S. employees, none of them unionized. There is strong evidence that what is good for Wal-Mart is not necessarily good for the American worker.

The giant retailer generated over \$9 billion dollars in profits in its most recent fiscal year, yet most of the company's rank and file employees earn wages that put them

¹ Oxford Dictionary of Quotations 737 (Angela Partington ed., 4th ed. 1992) (quoting Charles E. Wilson, President of General Motors 1941-53 ("For years I thought what was good for our country was good for General Motors and vice versa. The difference did not exist. Our company is too big. It goes with the welfare of the country.")).

² Cait Murphy, *Wal-Mart Rules*, FORTUNE MAGAZINE, April 15, 2002.

³ U.S. Department of Labor, Bureau of Labor Statistics, *Industry at a Glance*, available at <http://www.bls.gov/iag/manufacturing.htm>.

⁴ Stephen Herzenberg ET AL., *NEW RULES FOR A NEW ECONOMY: EMPLOYMENT & OPPORTUNITY IN POSTINDUSTRIAL AMERICA* 7 (1998).

below the federal poverty level. Additionally, more than half of Wal-Mart's employees are not covered by an employer-provided health insurance plan. Wal-Mart imposes a waiting period for health care eligibility and even those employees who are eligible can often not afford the cost of the plan.

There is considerable evidence of Wal-Mart frequently violates worker protection and anti-discrimination statutes with its employees. A gender discrimination lawsuit is pending which could be the largest in history with a potential class size between 1.6 and 2.5 million present and former Wal-Mart employees. The plaintiffs in that suit allege Wal-Mart discriminates against women in promotion opportunities and pay. Wal-Mart has been found to have committed many Unfair Labor Practices at the National Labor Relations Board and to have violated the Fair Labor Standards Act by requiring its employees to work forced overtime without pay. The company also faces an investigation and lawsuits regarding the use of illegal immigrants to clean its stores.

Wal-Mart, as the largest employer in the U.S. today, is setting a lowest common denominator standard. This is a drastic change to the times when General Motors set the bar higher as an employer and other employers followed its lead.

The impacts of Wal-Mart's employment practices go beyond its 1.2 million employees. Wal-Mart's constant drive for "always low prices" has forced many of its suppliers to outsource manufacturing jobs from the U.S. to China. Wal-Mart is the largest importer of merchandise from China and imported \$15 billion worth of goods from that country in 2003, nearly 1/8 of all U.S. imports from China.

Closer to home, Wal-Mart's large-scale entry into the grocery business also was a contributing factor in the recent California Grocery Strike/Lockout. When the grocery

store owners learned that non-union Wal-Mart was bringing its supercenters--discount stores and full-line grocery stores combined--into California, the store owners asked their unionized employees to pick up a larger part of health insurance costs. When the two sides could not reach agreement, 70,000 unionized grocery workers were on the picket line for nearly five months. The strike/lockout resolved itself in such a way that the grocery stores in the future will be able to be more like Wal-Mart providing new hires with lower pay and offer less generous health coverage.

This paper is a study of Wal-Mart and the problems the company presents in America's workforce. This paper concludes that the most effective solution is the unionization of Wal-Mart's employees. Wal-Mart fiercely opposes the formation of labor unions and none of its employees are represented by a union. Nowhere in the American workforce is the power imbalance between employer and employee more apparent than at Wal-Mart. Nearly every Wal-Mart employee is employed at will and can be fired at any time for any reason or no reason at all. The individual Wal-Mart employee has absolutely no power to negotiate terms and conditions of employment.

To date, unions have been unsuccessful in their efforts to organize Wal-Mart, primarily due to an outdated National Labor Relations Act (NLRA) which provides untimely and inadequate remedies. Legislation is pending in Congress which would amend the NLRA and make it easier for unions to organize employers like Wal-Mart. However, such legislation is flawed and therefore unlikely to become law. This paper offers suggested practices the unions could employ to succeed in their efforts to unionize Wal-Mart on the uneven playing field provided by the NLRA.

Although Wal-Mart does offer its customers low prices, these prices come at a cost to all American workers. A consistent theme seen in Wal-Mart's employment practices is that there is a discernible difference between the Wal-Mart that Sam Walton, "Mr. Sam" to his employees, built in the 1960s and 1970s and the corporate mindset that runs the company today. Sam Walton retired as Wal-Mart's Chief Executive Officer in 1988 and died in 1992.⁵ Since then, many of the core principles of Wal-Mart's founder have been abandoned by the corporation.

Part I will discuss how massive Wal-Mart has become in recent decades. Wal-Mart's size enables it to set wages and prices that have influence throughout the country. This part will also review Wal-Mart's history, from its humble beginnings as a single store in Arkansas started by Sam Walton into the world's largest corporation which has seen unprecedented growth. This part will also discuss the poor wages and benefits Wal-Mart provides its employees.

Part II will take a detailed look at Wal-Mart's employment practices. Even though Sam Walton emphasized taking care of his people, Wal-Mart in recent years has committed numerous Unfair Labor Practices and the company is facing what could be the largest discrimination lawsuit in history, with a potential plaintiff class of more than one million women who allege unlawful discrimination in promotions and pay. Wal-Mart is also charged with forcing its employees to work overtime without pay and under investigation regarding the use of illegal immigrants to clean its stores. Finally, this part will discuss lawsuits the company has faced regarding its purchase of life insurance

⁵ Wal-Mart Annual Report for Investors, 2000, available at http://www.walmartstores.com/Files/2000_annualreport.pdf

policies on its employees without their knowledge or consent--so-called "Dead Peasant" life insurance policies.

Part III will discuss the larger impacts of Wal-Mart. The company's growth comes at a time when America's economy is continuing to shift from a manufacturing base to a service industry base. This section will discuss the continuing loss of manufacturing jobs and the role Wal-Mart plays in the outsourcing of jobs to China. This part will also review Wal-Mart's move into the grocery business in California as a contributing factor in the five-month California grocery strike/lockout. This section will discuss what caused the strike, how it was resolved, and the impacts of the strike.

Part IV will focus on the importance of unions in general as the sole mechanism designed to equalize the inherent power imbalance in the employment relationship. The collective voice of unionization empowers workers in a country where the default rule is employment-at-will. Unionization also provides a wage premium for workers and generally provides better employment benefits. This section argues that the most effective solution to the problems presented by Wal-Mart is the unionization of that workforce. This section will also discuss the decline of union density rates and evaluate some of the reasons for that decline.

Part V will focus on the NLRA and its ineffectiveness at protecting American workers. This part will illustrate the ineffectiveness of the NLRA through some of the efforts unions have made to organize Wal-Mart employees. Wal-Mart resisted those efforts at unionization, sometimes illegally, but the NLRA provided only untimely and ineffective remedies. The outdated and impotent NLRA is making the task of organizing Wal-Mart even more difficult. This part will discuss the single union election Wal-Mart

employees won in Jacksonville, Texas. In that store, the meatcutting department voted for a union, but eleven days later Wal-Mart disbanded its meat-cutting departments nationwide and moved to selling only prepackaged meat. This section will review the more than 250 Unfair Labor Practice (ULP) complaints that have been filed against Wal-Mart and the findings of some of the cases where the National Labor Relations Board found Wal-Mart committed ULPs. This part will also discuss a pending effort to modify the NLRA, the Employee Free Choice Act (EFCA), and analyze what impact this bill could have on American workers. This part concludes that the EFCA is flawed in that it seeks to abandon the secret ballot election process. It is unlikely to become law in its current form and unions are going to have to continue playing on the uneven field provided by the NLRA.

Part VI will illustrate why Wal-Mart must be unionized and the impact such organization could have on America's larger economy. It will explore other possible solutions to the problems presented by Wal-Mart such as traditional litigation and consumer boycotts, but concludes these options would be ineffective in requiring Wal-Mart to pay higher wages, provide better benefits, and protect U.S. jobs. This part also reviews Costco, a direct competitor of Wal-Mart with a unionized workforce. Costco pays better wages and provides the majority of its employees with affordable health care coverage. Costco is still a profitable company and illustrates that a unionized workforce can be effective in today's retail environment.

Part VII will suggest specific strategies union organizers should engage in as they continue to attempt to unionize Wal-Mart. Since the EFCA is unlikely to become law in its present form, these organizers are going to have to adopt creative and powerful

strategies to help them overcome the obstacles allowed by the outdated and ineffective NLRA. This part recommends that unions merge to become bigger and financially stronger, make efforts to change public perception of unionization, hire the right organizers, and focus the effort to unionize Wal-Mart in California. That state has the highest number of union members in the nation and there is strong evidence the residents of the state support unionization and oppose much about Wal-Mart.

Part I - The Problems Presented by Wal-Mart

1. Wal-Mart's Size

In order to understand the full impact Wal-Mart has on the American workplace, it is necessary to realize the scope and size of Wal-Mart.⁶ Simply put, Wal-Mart is the world's largest company.⁷ Wal-Mart was named to the top of the Fortune 500 list as the largest publicly traded company in 2004 with annual sales of \$257 billion.⁸ This marks the third consecutive year that Wal-Mart has topped the Forbes 500.

Wal-Mart is by far the world's largest retailer.⁹ It is three times the size of the world's number two retailer, France's Carrefour.¹⁰ Every week, 138 million shoppers visit a Wal-Mart store; last year, 82 percent of American households made at least one purchase at Wal-Mart.¹¹ Wal-Mart has become the largest customer for the world's biggest consumer brands. General Mills, for example, gets 13 percent of its sales through Wal-Mart.¹²

Wal-Mart's competitors in the U.S. lag far behind. Target is the second largest retailer in the U.S. and is ranked 23rd on the Forbes 500 list with \$48 billion in annual

⁶ The term, "Wal-Mart," as used throughout this paper includes all divisions of Wal-Mart: Wal-Mart Discount Stores, Sam's Clubs, a membership warehouse in the United States, and Wal-Mart's International segment.

⁷ Jessica Garrison and Sara Lin, *Wal-Mart vs. Inglewood a Warm-Up for L.A. Fight*, LOS ANGELES TIMES, April 2, 2004.

⁸ Michael P. Regan, *Wal-Mart Tops Fortune 500 List*, THE WASHINGTON POST, March 22, 2004, page A-5.

⁹ Anthony Bianco and Wendy Zellner, *Low prices are great. But Wal-Mart's dominance creates problems--for suppliers, workers, communities, and even American culture; Is Wal-Mart Too Powerful?*, BUSINESS WEEK Monday, October 6, 2003.

¹⁰ Anthony Bianco and Wendy Zellner, *Low prices are great. But Wal-Mart's dominance creates problems--for suppliers, workers, communities, and even American culture; Is Wal-Mart Too Powerful?*, BUSINESS WEEK Monday, October 6, 2003.

¹¹ Anthony Bianco and Wendy Zellner, *Low prices are great. But Wal-Mart's dominance creates problems--for suppliers, workers, communities, and even American culture; Is Wal-Mart Too Powerful?*, BUSINESS WEEK Monday, October 6, 2003.

¹² Thomas Lee, *A big helping of cash; Food companies pay huge sums to retailers to fund sales and promotions*, STAR TRIBUNE, April 26, 2004.

sales--less than 20 percent of Wal-Mart's total sales.¹³ Sears Roebuck ranks 32nd and had \$41 billion in annual sales, followed by J.C. Penney at 43rd with almost \$33 billion.¹⁴

As of April 30, 2004, Wal-Mart had 3566 stores in the United States.¹⁵ There are another 1482 stores in eight countries around the world including Argentina, China and South Korea.¹⁶ Wal-Mart opens more than 200 new stores each year. In Fiscal Year 2004, it opened an additional 235 stores.¹⁷ Wal-Mart's home office in Bentonville, Arkansas, monitors the smallest details of daily operations in each of its stores, including the temperature setting and music played. Every store manager is connected at all times to the home office through a real-time computer link via satellite. The home office can monitor every bit of data from every store through this system and uses it to ensure total centralization of operations.¹⁸ This computer system is the largest civilian data base in the world.¹⁹

The latest Wal-Mart expansion tool is known as the "supercenter," which averages 187,000 square feet in size, offers a wide variety of general merchandise and is a full-line supermarket.²⁰ Since 1996 the number of Wal-Mart supercenters nationwide has jumped from 260 to 1,060, and the company will probably double that in the next

¹³ Fortune 500, available at <http://www.fortune.com/fortune/fortune500/snapshot/0,14923,1,00.html>. last visited March 21, 2004.

¹⁴ Fortune 500, available at <http://www.fortune.com/fortune/fortune500/snapshot/0,14923,1,00.html>, last visited March 21, 2004.

¹⁵ Wal-Mart Investor Information, available at <http://investor.walmartstores.com/phoenix.zhtml?c=112761&p=irol-irhome>

¹⁶ Wal-Mart Investor Information, available at <http://investor.walmartstores.com/phoenix.zhtml?c=112761&p=irol-irhome>

¹⁷ Wal-Mart 2004 Annual Report for Investors, available at http://media.corporate-ir.net/media_files/irol/11/112761/reports/wmt_040704.pdf

¹⁸ *Dukes, et al. v. Wal-Mart Stores, Inc.*, No. CO1-2252 MJJ, United States District Court, N.D. California, Plaintiff's Class Action Brief, April 28, 2003.

¹⁹ SAM WALTON & JOHN HUEY, MADE IN AMERICA, MY STORY, 213 (1992).

four years.²¹ Each supercenter is said to generate \$80 million in annual sales.²² Despite its massive size today, the company comes from humble roots.

2. Wal-Mart's History

Sam Walton entered retailing three days after graduating from the University of Missouri in June 1940 as a management trainee for J.C. Penney with a salary of \$75 a month.²³ After serving with the Army during World War II,²⁴ Walton borrowed \$20,000 from his father-in-law and bought his first retail store, a Ben Franklin franchise store in Newport, Arkansas, in 1945.²⁵ Walton made the previously unsuccessful store profitable in the town of about 7,000 people. Walton's success generated notice and once the store's lease expired, his landlord refused to renew the lease at any price and forced Walton to sell the store to the landlord's son.²⁶ Walton describes this as one of the low points of his business life, but says he turned it into an opportunity.²⁷

Walton relocated his family to Bentonville, Arkansas, a town of just 3,000 people, in 1950 at the age of 32 and started over with another store which he again made profitable.²⁸ He then expanded and bought a store in Fayetteville, Arkansas, which became Walton's Five and Dime.²⁹ The expansions continued and the first Wal-Mart

²⁰ Wal-Mart 2004 Annual Report for Investors, available at http://media.corporate-ir.net/media_files/irol/11/112761/reports/wmt_040704.pdf

²¹ Brian O'Keefe, *Wal-Mart, Meet Your New Neighborhood Grocer*, FORTUNE MAGAZINE, April 28, 2002.

²² Andy Fixmer, David Greenberg, *Wal-Mart, labor massing troops*, LOS ANGELES BUSINESS JOURNAL, December 15, 2003.

²³ SAM WALTON & JOHN HUEY, MADE IN AMERICA, MY STORY, 17 (1992).

²⁴ SAM WALTON & JOHN HUEY, MADE IN AMERICA, MY STORY, 20 (1992) (Walton's military duties were limited to non-combat positions in the U.S. due to a minor heart irregularity).

²⁵ SAM WALTON & JOHN HUEY, MADE IN AMERICA, MY STORY, 22 (1992); Wal-Mart 1980 Annual Report for investors, available at www.walmartstores.com/Files/1980AR.pdf

²⁶ SAM WALTON & JOHN HUEY, MADE IN AMERICA, MY STORY, 120 (1992).

²⁷ SAM WALTON & JOHN HUEY, MADE IN AMERICA, MY STORY, 31 (1992).

²⁸ SAM WALTON & JOHN HUEY, MADE IN AMERICA, MY STORY, 120 (1992).

²⁹ SAM WALTON & JOHN HUEY, MADE IN AMERICA, MY STORY, 120 (1992).

Discount City store was opened in 1962 in Rogers, Arkansas.³⁰ In these early days, Walton had a vision of a different kind of retail. Rather than charging a little less than his competitors, Walton wanted to slash prices as much as he could and still make a profit. Other stores would use price breaks from manufacturers as a way to boost their bottom lines, paying less at wholesale while leaving retail prices untouched. Walton passed such savings on to his customers. Walton believed he would make up the difference in volume and he was right.³¹

In 1969, Walton opened Wal-Mart Number 18, returning to Newport, Arkansas, the location of Walton's first store which he had lost to his former landlord. Wal-Mart Number 18 was successful and quickly put Walton's old Ben Franklin store, still run by the landlord's son, out of business.³² By the mid-1980s, Wal-Mart's success had catapulted Walton to number one on the Forbes list of richest Americans.³³ Five of Sam Walton's heirs are among the 15 richest people in the world today.³⁴

3. Wal-Mart's Growth

Wal-Mart's annual sales of nearly \$257 billion dollars in the fiscal year ending January 31, 2004, was an increase of 12 percent from 2003.³⁵ A review of the company's 11-year financial summary shows that Wal-Mart has averaged a 15.8 percent growth rate each year.³⁶ Wal-Mart's growth in recent decades has been phenomenal.

³⁰ Wal-Mart 1980 Annual Report for investors, available at www.walmartstores.com/Files/1980AR.pdf

³¹ Abigail Goldman and Nancy Cleeland, *The Wal-Mart Effect*, LOS ANGELES TIMES, November 23, 2003.

³² SAM WALTON & JOHN HUEY, *MADE IN AMERICA, MY STORY*, 177 (1992).

³³ Abigail Goldman and Nancy Cleeland, *The Wal-Mart Effect*, LOS ANGELES TIMES, November 23, 2003.

³⁴ Thomas G. Donlan, *America at a Discount: Wal-Mart is a success story that some love to hate*, BARRONS, December 29, 2003.

³⁵ Wal-Mart 2004 Annual Report for Investors, available at http://media.corporate-ir.net/media_files/irol/11/112761/reports/wmt_040704.pdf

³⁶ Wal-Mart 2004 Annual Report for Investors, available at http://media.corporate-ir.net/media_files/irol/11/112761/reports/wmt_040704.pdf

Year	Stores	Sales	Profits	Employees
1970 ³⁷	32	\$31 million	\$1.2 million	2300
1980 ³⁸	276	\$1.2 billion	\$41 million	21,000
1990 ³⁹	1525	\$25.8 billion	\$1 billion	275,000
2000 ⁴⁰	3989	\$156.2 billion	\$5.37 billion	900,000
2004 ⁴¹	5048	\$257 billion	\$9.05 billion	1.2 million

Wal-Mart's annual sales in 2004 of \$257 billion was nearly twice as much as General Electric and almost eight times as much as Microsoft.⁴² It is the nation's largest seller of toys, furniture, jewelry, dog food and scores of other consumer products. It is the largest grocer in the United States.⁴³

Wal-Mart reported \$9.05 billion dollars in profits in 2004, up 12.6 percent from 2003.⁴⁴ Starting from a small store in a small state, Wal-Mart now would be the 31st largest economy in the world if it were a country--bigger than Saudi Arabia and all its oil

³⁷ SAM WALTON & JOHN HUEY, *MADE IN AMERICA, MY STORY*, 120 (1992). The number of employees here comes from Wal-Mart's 1972 Annual Report, available at <http://www.walmartstores.com/Files/1972AR.pdf>. This was the first year Wal-Mart was publicly traded on the New York Stock Exchange.

³⁸ SAM WALTON & JOHN HUEY, *MADE IN AMERICA, MY STORY*, 120 (1992); Wal-Mart 1980 Annual Report for investors, available at www.walmartstores.com/Files/1980AR.pdf

³⁹ Wal-Mart 1990 Annual Report for Investors, available at <http://www.walmartstores.com/Files/1990AR.pdf>

⁴⁰ Wal-Mart 2000 Annual Report for Investors, available at <http://www.walmartstores.com/Files/2000-AR.pdf>

⁴¹ Wal-Mart 2004 Annual Report for Investors, available at http://media.corporate-ir.net/media_files/irol/11/112761/reports/wmt_040704.pdf

⁴² Abigail Goldman and Nancy Cleeland, *The Wal-Mart Effect*, LOS ANGELES TIMES, November 23, 2003.

⁴³ Abigail Goldman and Nancy Cleeland, *The Wal-Mart Effect*, LOS ANGELES TIMES, November 23, 2003.

⁴⁴ Wal-Mart 2004 Annual Report for Investors, available at http://media.corporate-ir.net/media_files/irol/11/112761/reports/wmt_040704.pdf; Fortune 500 available at <http://www.fortune.com/fortune/fortune500/snapshot/0,14923,1,00.html>, last visited march 21, 2004.

and bigger than Switzerland and all its banks, factories and tourism.⁴⁵ If the company can maintain its current growth rate, it will double its revenues over the next five years and top \$600 billion in 2011.⁴⁶

4. Things to Admire about Wal-Mart

Employment practices aside, there is a great deal to admire about Wal-Mart. The company's meticulous management of the flow of goods, from the factory floor to the store shelf, has shaved shipping and inventory costs to a degree that retailing experts say is unprecedented. "You could argue that some of what Wal-Mart does to cut costs has been win-win," said Richard S. Tedlow, a professor business administration at Harvard Business School. "What's being squeezed out is waste."⁴⁷

At every one of the Wal-Marts in the U.S., thermostats are kept at a steady 73 degrees in summer, 70 degrees in winter; raising or lowering the temperature is considered a waste of money.⁴⁸ Wal-Mart has also forced competitors to become more efficient, driving the nation's productivity--output per hour of work--even higher. New England Consulting estimates that Wal-Mart saved its U.S. customers \$20 billion last year alone. Factor in the price cuts other retailers must make to compete, and the total annual savings approach \$100 billion.⁴⁹ However, as discussed in more detail below, this savings comes at a high cost in other ways.

⁴⁵ Thomas G. Donlan, *America at a Discount: Wal-Mart is a success story that some love to hate*, BARRONS, December 29, 2003.

⁴⁶ Anthony Bianco and Wendy Zellner, *Low prices are great. But Wal-Mart's dominance creates problems--for suppliers, workers, communities, and even American culture; Is Wal-Mart Too Powerful?*, BUSINESS WEEK Monday, October 6, 2003.

⁴⁷ Abigail Goldman and Nancy Cleeland, *The Wal-Mart Effect*, LOS ANGELES TIMES, November 23, 2003.

⁴⁸ Abigail Goldman and Nancy Cleeland, *The Wal-Mart Effect*, LOS ANGELES TIMES, November 23, 2003.

⁴⁹ Anthony Bianco and Wendy Zellner, *Low prices are great. But Wal-Mart's dominance creates problems--for suppliers, workers, communities, and even American culture; Is Wal-Mart Too Powerful?*, BUSINESS WEEK Monday, October 6, 2003.

Wal-Mart's executives, although well-paid, do not squander this efficiency.

Walton worked in a ground-floor office in Bentonville, Arkansas, barely big enough for a conference table.⁵⁰ The current Chief Executive Officer, H. Lee Scott Jr., like all Wal-Mart executives, empties his own trash and shares budget hotel rooms when traveling. Everyone flies coach.⁵¹ "We do not have limousines," said Scott, who certainly could afford one, having made nearly \$18 million last year in salary, bonus and stock, plus options with an estimated value of \$11.3 million. "I drive a Volkswagen Bug."⁵²

5. Problem - Wal-Mart Pays Low Wages

The more you share profits with your associates--whether its in salaries or incentives or bonuses or stock discounts--the more profit will accrue to the company. Why? Because the way management treats the associates is exactly the how the associates will then treat the customers. - Sam Walton⁵³

This is the first area where today's Wal-Mart has deviated from one of its founder's core principles. With its massive, entirely non-unionized workforce, Wal-Mart plays a huge role in wages and working conditions worldwide. As the largest employer in America, it sets the standard for wages in the industry. Wal-Mart declines to divulge salary information, but wage data obtained from a pending gender discrimination class action lawsuit in California shows that in 2001, Wal-Mart's sales clerks made less, on average, than the federal poverty level.⁵⁴ The average, full-time sales clerk in 2001

⁵⁰ Abigail Goldman and Nancy Cleeland, *The Wal-Mart Effect*, LOS ANGELES TIMES, November 23, 2003.

⁵¹ Abigail Goldman and Nancy Cleeland, *The Wal-Mart Effect*, LOS ANGELES TIMES, November 23, 2003.

⁵² Abigail Goldman and Nancy Cleeland, *The Wal-Mart Effect*, LOS ANGELES TIMES, November 23, 2003.

⁵³ SAM WALTON & JOHN HUEY, *MADE IN AMERICA, MY STORY*, 128 (1992).

⁵⁴ Anthony Bianco and Wendy Zellner, *Low prices are great. But Wal-Mart's dominance creates problems--for suppliers, workers, communities, and even American culture; Is Wal-Mart Too Powerful?*, BUSINESS WEEK Monday, October 6, 2003.

earned under \$14,000 a year, including bonuses.⁵⁵ The federal poverty line for a family of three was \$14,630 that same year.⁵⁶

By the company's own admission, a full-time worker might not be able to support a family on a Wal-Mart paycheck.⁵⁷ "Wal-Mart is a great match for a lot of people," said Wal-Mart spokesman Mona Williams, "but if you are the sole provider for your family and do not have the time or the skills to move up the ladder, then maybe it's not the right place for you."⁵⁸ Analysts say that Wal-Mart's labor costs are consistently lower than competitors and are the single biggest reason Wal-Mart's operating costs are 16.5 percent of sales instead of the retail industry's average of 20.7 percent.⁵⁹

The pay scale does improve as one moves up the corporate ladder. Sales associates can earn approximately \$16,000 annually and department heads can earn up to \$23,000 each year.⁶⁰ There are approximately six Assistant Managers in the typical supercenter and they are on the lowest rung of Wal-Mart's salaried positions, earning anywhere from a little below \$30,000 up to \$40,000 in higher-wage areas.⁶¹ Wal-Mart store managers earn approximately \$95,000 annually, including bonuses. A management

⁵⁵ Dukes, et al. v. Wal-Mart Stores, Inc., No. CO1-2252 MJJ, United States District Court, N.D. California; Plaintiff's statistics available at <http://www.walmartclass.com/staticdata/walmartclass/walmart.ppt>.

⁵⁶ Anthony Bianco and Wendy Zellner, *Low prices are great. But Wal-Mart's dominance creates problems—for suppliers, workers, communities, and even American culture; Is Wal-Mart Too Powerful?*, BUSINESS WEEK Monday, October 6, 2003..

⁵⁷ Abigail Goldman and Nancy Cleeland, *The Wal-Mart Effect*, LOS ANGELES TIMES, November 23, 2003.

⁵⁸ Abigail Goldman and Nancy Cleeland, *The Wal-Mart Effect*, LOS ANGELES TIMES, November 23, 2003.

⁵⁹ Mark Gimein, *Wal-Mart--Sam Walton Made Us a Promise*, FORTUNE MAGAZINE, March 18, 2002.

⁶⁰ Dukes, et al. v. Wal-Mart Stores, Inc., No. CO1-2252 MJJ, United States District Court, N.D. California; Plaintiff's statistics available at <http://www.walmartclass.com/staticdata/walmartclass/walmart.ppt>.

⁶¹ Mark Gimein, *Wal-Mart--Sam Walton Made Us a Promise*, FORTUNE MAGAZINE, March 18, 2002.

position requires long hours--as many as 80 a week--and often, a willingness to relocate.⁶²

A report commissioned by the Los Angeles City Council concluded that whereas a unionized grocery worker makes \$12.87 per hour, the average Wal-Mart associate is paid \$8 per hour. "Wal-Mart as an employer is not good for our economy or our communities," said Barbara Maynard, a labor consultant to the United Food and Commercial Workers union (UFCW.) "They employ people at poverty wages and offer a health insurance plan that's so expensive employees can't afford it."⁶³ On average, Wal-Mart's wage-and-benefit package is about \$10 an hour less than those offered by unionized supermarkets.⁶⁴

6. Problem - 660,000 Wal-Mart Employees Do Not Receive Health Benefits

There is real dispute about exactly how many of Wal-Mart's employees receive health benefits. According to union officials, two-thirds of Wal-Mart workers don't have health insurance because they can't afford it or don't qualify.⁶⁵ "Wal-Mart has a crummy health plan, it's very expensive, and every year, premiums go up," says Linda Gruen, a former cashier who quit to become a union organizer. "We need to do something."⁶⁶

Wal-Mart officials disagree with the union's figures and say that about 75 percent of employees are eligible for health care coverage. The remaining 25 percent are in waiting periods, which are six months for full-time employees and two years for part

⁶² Abigail Goldman and Nancy Cleeland, *The Wal-Mart Effect*, LOS ANGELES TIMES, November 23, 2003.

⁶³ Andy Fixmer, David Greenberg, *Wal-Mart, labor massing troops*, LOS ANGELES BUSINESS JOURNAL, December 15, 2003.

⁶⁴ Abigail Goldman and Nancy Cleeland, *The Wal-Mart Effect*, LOS ANGELES TIMES, November 23, 2003.

⁶⁵ Stephanie Armour, *Wal-Mart Takes Hits on Worker Treatment*, USA TODAY, February 10, 2003.

⁶⁶ Stephanie Armour, *Wal-Mart Takes Hits on Worker Treatment*, USA TODAY, February 10, 2003.

time. Of those eligible for the health plan, about 60 percent sign up. The company picks up two-thirds of the cost.⁶⁷

Doing simple math with the numbers provided by Wal-Mart shows that more than half of Wal-Mart's employees are without health insurance. 75 percent of the 1.2 million employees are eligible--that means only 900,000 eligible employees. If only 60 percent of those eligible sign up, that means 540,000 sign up. That leaves 660,000 Wal-Mart employees without employer-provided health insurance. A recent study from the University of Minnesota's School of Public Health concluded 20 million working Americans do not have health insurance.⁶⁸ A single employer, Wal-Mart, is likely contributing more than 600,000 workers to this total number.

Wal-Mart's critics say only 60 percent eligible employees sign up for health coverage because they cannot afford the premiums and the deductibles given the low wages Wal-Mart pays.⁶⁹ They also claim those who do have health coverage through the company often cannot afford deductibles that run as high as \$3,000 a year. "Their employees are ending up at the county hospital and become the burden of the county," said Nevada's Clark County Manager Thom Reilly.⁷⁰

Wal-Mart spokeswoman Amy Hill said the company's health plan costs \$13 every two weeks for an individual and \$57 every two weeks for a family.⁷¹ Again, doing simple math with Wal-Mart's numbers shows that Wal-Mart's critics may be right. The

⁶⁷ Stephanie Armour, *Wal-Mart Takes Hits on Worker Treatment*, USA TODAY, February 10, 2003.

⁶⁸ Mark Sherman, *Twenty Million Workers Have No Health Coverage*, ASSOCIATED PRESS, May 5, 2004, available at <http://aolsvc.news.aol.com/business/article.adp?id=20040505074409990015>.

⁶⁹ Abigail Goldman and Nancy Cleeland, *The Wal-Mart Effect*, LOS ANGELES TIMES, November 23, 2003.

⁷⁰ Abigail Goldman and Nancy Cleeland, *The Wal-Mart Effect*, LOS ANGELES TIMES, November 23, 2003.

⁷¹ Alan Zibel, *Grocery industry's labor woes are rooted in Wal-Mart expansion*, THE OAKLAND TRIBUNE, December 21, 2003.

\$57 family health care plan described by Wal-Mart's spokesperson, comes to \$1368 over the course of a year, nearly 10 percent of a full-time cashier's gross pay.

This trend is present in many service industry jobs and is not limited to just Wal-Mart. According to the Employee Benefit Research Institute in Washington, nearly 44 percent of workers in the retail sector as a whole have employer-provided health coverage. Among big companies in all industries, the figure is 66 percent.⁷² However, as the nation's largest employer, Wal-Mart sets the standard. If Wal-Mart were to make health insurance available and affordable for all of its employees, other service industry employers would be forced to follow or lose its employees to Wal-Mart.

⁷² Abigail Goldman and Nancy Cleeland, *The Wal-Mart Effect*, LOS ANGELES TIMES, November 23, 2003.

Part II - Wal-Mart's Employment Practices

Sam Walton generated tremendous loyalty from his employees. He made frequent personal visits to the stores and created a sense of family.⁷³ He wrote in his autobiography, Made in America:

If you're good to people, and fair with them, and demanding of them, they will eventually decide that you're on their side.⁷⁴

If you want the people in the stores to take care of the customers, you have to make sure you're taking care of the people in the stores. That's the most important single ingredient of Wal-Mart's success.⁷⁵

Longtime associates recall that at each store Walton visited he would pull some crackers off the shelf and set up shop in the back of the store, chatting with associates and listening to their concerns. "He was so real and so down to earth," recalls Sheila Kaylor, a Wal-Mart worker who met Sam Walton several times.⁷⁶ In Walton's time, Wal-Mart demonstrated its concern for workers in many ways that were small but specific: time and a half for work on Sundays, an "open door" policy that let workers bring concerns to managers at any level, the perception of a real chance of promotion--about 70 percent of store managers started as hourly associates.⁷⁷

Walton retired as CEO of the company in 1988, died in 1992, and there are some unsettling indications the deal Walton made with his employees is fraying.⁷⁸ The time and a half pay on Sundays disappeared right after Walton retired.⁷⁹ Wal-Mart without Walton has done more to its employees than cut back on Sunday pay.

⁷³ Mark Gimein, *Wal-Mart--Sam Walton Made Us a Promise*, FORTUNE MAGAZINE, March 18, 2002.

⁷⁴ SAM WALTON & JOHN HUEY, *MADE IN AMERICA, MY STORY*, 138 (1992).

⁷⁵ SAM WALTON & JOHN HUEY, *MADE IN AMERICA, MY STORY*, 80 (1992).

⁷⁶ Mark Gimein, *Wal-Mart--Sam Walton Made Us a Promise*, FORTUNE MAGAZINE, March 18, 2002.

⁷⁷ Mark Gimein, *Wal-Mart--Sam Walton Made Us a Promise*, FORTUNE MAGAZINE, March 18, 2002.

⁷⁸ Mark Gimein, *Wal-Mart--Sam Walton Made Us a Promise*, FORTUNE MAGAZINE, March 18, 2002.

⁷⁹ Mark Gimein, *Wal-Mart--Sam Walton Made Us a Promise*, FORTUNE MAGAZINE, March 18, 2002.

1. Unfair Labor Practices

Employees and union organizers who have tried to unionize Wal-Mart have repeatedly charged that the company engages in Unfair Labor Practices (ULPs). More than 250 ULP charges have been filed against Wal-Mart⁸⁰ and the National Labor Relations Board (NLRB) has found that Wal-Mart committed many ULPs, such as unlawfully firing, threatening to fire, disciplining and refusing to promote employees who support the union⁸¹

When asked about these ULPs, Wal-Mart spokeswoman Christie Gallagher said her company is not anti-labor, but is instead "pro-associate."⁸² She said Wal-Mart is union free because Wal-Mart workers choose not to be represented by a union. "Obviously, the associates make that decision." She denies claims that Wal-Mart puts pressure on employees when they are in organizing drives. "We think unions work at other companies and industries, we just don't think Wal-Mart is one of them," Gallagher said.⁸³

Union organizers instead characterize Wal-Mart as fiercely anti-union. At the first hint of union activity at a Wal-Mart store today, store managers are directed to call a hotline and the company dispatches special teams from corporate headquarters in Bentonville, Arkansas, to dissuade workers from signing up. "Once you start organizing,

⁸⁰ Brendan Shriane, *Unions Adapt to a Changing World*, EVERETT BUSINESS JOURNAL, December 1, 2003.

⁸¹ Wal-Mart and UFCW, 2003 WL 22532371 (NLRB) November 4, 2003; Wal-Mart and United Paperworkers International, 2003 WL 22184803 (NLRB); Wal-Mart and UFCW, 2002 WL 31323195 (NLRB) September 24, 2003; Sam's Club and Alan T. Peto, an individual and UFCW, 2001 WL 1635459 (NLRB) December 6, 2001. An apt description of the process is found in a recent opinion article: Steven Pearlstein, *Workers' Rights Are Being Rolled Back*, THE WASHINGTON POST, February 25, 2004, page E-1.

⁸² Adam Fifield, *She was fired from Wal-Mart for "insubordination," A foot soldier's march to unionize*, THE PHILADELPHIA INQUIRER, December 26, 2003.

⁸³ Adam Fifield, *She was fired from Wal-Mart for "insubordination," A foot soldier's march to unionize*, THE PHILADELPHIA INQUIRER, December 26, 2003.

they put the hammer down, and the suits come in from Bentonville," said Brian Covely of UFCW.⁸⁴

Wal-Mart acknowledged that such teams were used, but said their purpose was not to browbeat workers but rather "to answer questions the associates might have about the promises the union has made to them."⁸⁵ A full discussion of ULPs committed by Wal-Mart is in Part V of this paper, where efforts to unionize Wal-Mart are reviewed. In addition to ULPs, there are many other legal actions pending between Wal-Mart and its employees.

2. Sex Discrimination Class Action

In the old days, retailers felt the same way about women that they did about college boys, only more so. In addition to thinking women weren't free to move, they didn't think women could handle anything but the clerk jobs because the managers usually did so much physical labor--unloading trucks and hauling merchandise out of the stockroom on a two-wheeler, mopping the floors and cleaning the windows if necessary. Nowadays, the industry has waked up to the fact that women make great retailers. So we at Wal-Mart, along with everybody else, have to do everything we possibly can to recruit and attract women. - Sam Walton⁸⁶

A massive employment discrimination lawsuit is pending against Wal-Mart in the Northern California Federal District Court.⁸⁷ On June 19, 2001, six current and former female Wal-Mart employees filed a lawsuit against the giant retailer under Title VII of the Civil Rights Act of 1964.⁸⁸ The lawsuit could eventually include up to 2.5 million

⁸⁴ Adam Fifield, *She was fired from Wal-Mart for "insubordination," A foot soldier's march to unionize*, THE PHILADELPHIA INQUIRER, December 26, 2003.

⁸⁵ Adam Fifield, *She was fired from Wal-Mart for "insubordination," A foot soldier's march to unionize*, THE PHILADELPHIA INQUIRER, December 26, 2003.

⁸⁶ Sam Walton with John SAM WALTON & JOHN HUEY, *MADE IN AMERICA, MY STORY*, 171 (1992).

⁸⁷ *Dukes, et al. v. Wal-Mart Stores, Inc.*, No. CO1-2252 MJJ, United States District Court, N.D. California

⁸⁸ 42 U.S.C. Sec. 2000e, et seq. The Plaintiffs also bring claims under the California Fair Employment & Housing Act, Government Codes 12920, et. Seq.

plaintiffs⁸⁹ and charges that Wal-Mart discriminates against its female employees in promotions and pay decisions.⁹⁰

Regarding promotions, the plaintiffs allege Wal-Mart failed to post information about how to apply for promotions and that employees were subjectively selected for management positions with a "tap on the shoulder" system that favored men over women.⁹¹ These allegations are based upon statistics. Specifically, although women comprised 67 percent of all hourly workers (cashiers and sales associates) and 78 percent of hourly department managers in the stores in 2001, women made up only 35 percent of assistant managers, 23 percent of co-managers, 14 percent of store managers, and 9 percent of district managers.⁹²

Regarding gender-based pay disparities, the plaintiffs claim women make less than men in all job classifications. For example, average annual earnings in 2001 for male cashiers was \$14,500, but only \$13,800 for women. The pay gap widens as one moves higher up the company ladder: male department heads earned an average of \$23,500, while female department heads earned only \$21,700; male store managers had annual earnings of \$105,700, but female store managers earned only \$89,300; at the regional vice president level, the average man makes \$419,435 a year, whereas the four women in the position earn an average of \$279,772.⁹³ "Women start out being paid less, and the gap just widens," said plaintiff's counsel Brad Seligman. "At every level, men get

⁸⁹ A Reuters news excerpt published in the LOS ANGELES TIMES, November 19, 2003, speculates that the potential class size could be 1.5 million women. However, at the oral argument regarding class action certification on September 24, 2003, Wal-Mart's attorneys, Mr. Paul Grossman, argued that the class size would be unmanageable and could reach 2.5 million by the time of trial due to employee turnover. Hearing Transcript, page 120, lines 1-3.

⁹⁰ Plaintiff's First Amended Complaint, June 19, 2001.

⁹¹ Oral Hearing Transcript, September 24, 2003, page 40, lines 1-4.

⁹² Plaintiff's Class Action Brief, April 28, 2003.

⁹³ Plaintiff's statistics available at: <http://www.walmartclass.com/staticdata/walmartclass/walmart.ppt>

paid more than women, and it does not appear to be explained by anything objective like seniority or anything else that we can identify. The only difference is gender."⁹⁴

Wal-Mart denies any national practice of unlawful discrimination and claims the plaintiffs are trying to hold it responsible for a long-established phenomenon in the American workplace: "The undisputed fact, present in virtually every major corporation, that the percentage of women at the lower level is higher than the percentage at the upper level."⁹⁵ Wal-Mart explains this phenomenon by stating that women are not interested in management positions due to long and unpredictable hours that such positions entail.⁹⁶ To the extent any discrimination did occur, Wal-Mart claims it would have been isolated incidents at the store manager level and not a nationwide practice.

The trial judge assigned the case recently granted the plaintiffs class action status pursuant to Federal Rule of Civil Procedure 23(b)(2).⁹⁷ The members of the class are all women employed at any Wal-Mart domestic retail store at any time since December 26, 1998. Wal-Mart had argued that the class size of at least 1.5 million current and former female employees would make the case unmanageable. The trial judge's June 22, 2004, rejected this argument and acknowledged the historical significance of Dukes v. Wal-Mart.

Certainly, the size of the putative class raises concerns regarding manageability which this Court must, and does, carefully consider. Title VII, however, contains no special exception for large employers. Enacted

⁹⁴ Lisa Girion, *Study Finds Pay Gap at Wal-Mart*, LOS ANGELES TIMES, February 4, 2003.

⁹⁵ Greg Burns, *Class action no bargain for Wal-Mart; 1.5 million could be added to bias suit by women*, CHICAGO TRIBUNE, September 24, 2003.

⁹⁶ Steven Greenhouse, *Wal-Mart Faces Lawsuit Over Sex Discrimination*, NEW YORK TIMES, February 16, 2003, at A22 (noting that a Wal-Mart official "said women's lack of interest in managerial jobs helped explain the lower percentage of women managers.") A summary of Wal-Mart's defense is available at: <http://www.walmartclass.com/staticdata/walmartclass/walmart.ppt>

⁹⁷ Dukes v. Wal-Mart, No. C 01-02252 MJJ, Order Granting in Part and Denying in Part motion for Class Certification, page 6, available at <http://www.cand.uscourts.gov/cand/judges.nsf/bc3702701e4eccd8588256d480060b71b?OpenView>, last visited June 22, 2004.

in 1964 during the height of the civil rights movement, this Act forbids gender and race-based discrimination in the American workplace . . .

Insulating our nation's largest employers from allegations that they have engaged in a pattern and practice of gender or racial discrimination--simply because they are large--would seriously undermine these imperatives. Indeed, it is interesting to note, as a matter of historical perspective, that Plaintiffs' request for class certification is being ruled upon in a year that marks the 50th anniversary of the Supreme Court's decision in Brown v. Board of Education, 347 U.S. 483 (1954). This anniversary serves as a reminder of the importance of the courts in addressing the denial of equal treatment under the law wherever and by whomever it occurs.⁹⁸

The class certification ruling carries huge ramifications for both parties. Some speculate that since the request for certification is granted, Wal-Mart will almost surely be compelled to settle, no matter the merits of its arguments. Even if Wal-Mart believes it has a strong case, the consequences of losing such massive litigation are too great a risk to run. Therefore, the decision to certify the class could be "the whole ball game."⁹⁹ One of the plaintiffs' attorneys summarized the case as follows:

Wal-Mart has been living in the America of thirty years ago, and those days are over. Certification of this class shows that no employer, not even the world's largest employer, is above the law. This decision sets the stage for women at Wal-Mart to get their fair share of pay and promotions which have been denied them for years.¹⁰⁰

The use of statistical evidence will play a central role in Dukes v. Wal-Mart. The Supreme Court has recognized the use of statistics as a valid method of proof in

⁹⁸ Dukes v. Wal-Mart, No. C 01-02252 MJJ, Order Granting in Part and Denying in Part motion for Class Certification, pages 4-5, available at <http://www.cand.uscourts.gov/cand/judges.nsf/bc3702701e4eecd8588256d480060b71b?OpenView>, last visited June 22, 2004.

⁹⁹ Greg Burns, *Class action no bargain for Wal-Mart; 1.5 million could be added to bias suit by women*, CHICAGO TRIBUNE, September 24, 2003.

¹⁰⁰ Joseph M. Sellers, as quoted in plaintiffs' Press Release: Federal Judge Orders Wal-Mart Stores, Inc., the Natino's Largest Private employer, To Stand Trial for Company-Wide Sex Discrimination, dated June 22, 2004, available at <http://www.walmartclass.com>, last visited June 23, 2004.

employment discrimination cases.¹⁰¹ Courts and statisticians use a "standard deviation," also referred to as "t-values," as a measure of deviations in an observed sample from the expected make-up of that sample. A large standard deviation suggests that an observed sample is far away from the expected mean. A small standard deviation suggests that an observed sample is clustered closely around the mean.¹⁰² The Supreme Court has set forth a standard of two or more standard deviations as statistically significant.¹⁰³ The plaintiffs claim they have statistical evidence which exceeds this standard.¹⁰⁴

The plaintiff's statistical expert, Oakland-based statistician Dr. Richard Drogin, has presented a statistical analysis of Wal-Mart's entire workforce. Regarding pay, Dr. Drogin concludes that women at Wal-Mart earn less than men holding the same job, for nearly all jobs, in every year since 1996 and that the differences in pay cannot be explained by seniority, turnover rates, or performance ratings. His results showed that women are paid at least 9.3 percent less than similarly situated men in every year. The initial regression regarding pay differences resulted in a t-value which is highly statistically significant and exceeds the legal threshold of two standard deviations.¹⁰⁵

Regarding promotions, Dr. Drogin conducted a promotion analysis to determine how many women one would expect to be promoted in a non-discriminatory system. The results showed a consistent pattern of under-promotion of women into each of the higher-level jobs in the stores. Specifically, Dr. Drogin found that between 1997 and early 2002, women received 2891 fewer promotions than would be expected from their

¹⁰¹ Hazelwood School District v. U.S., 433 U.S. 299 (1977).

¹⁰² Definition and information about standard deviations found at: <http://en.wikipedia.org/wiki/Mean>, last visited on April 19, 2004.

¹⁰³ Hazelwood at 309-311 & n. 14, 17 (1977).

¹⁰⁴ Plaintiffs' Reply in Support of Their Motion for Class Certification, July 25, 2003.

¹⁰⁵ Plaintiff's Class Action Brief, April 28, 2003.

representation in the feeder jobs. This result had a high degree of statistical significance and Dr. Drogin claims the statistics regarding promotions are "virtually impossible to occur by chance, if promotions were selected at random from the availability pool."¹⁰⁶

Wal-Mart has countered with its own expert in statistics, Dr. Joan Haworth. Dr. Haworth claims that Dr. Drogin's pay analysis failed to account for store level differences and that store-by-store analyses are the proper approach because of variations among store managers. Dr. Haworth's analysis divides the store data into as many as eight separate sub-units: grocery, non-grocery, and each "specialty" department: jewelry, shoes, optical, pharmacy, auto repair, and photo. Dr. Haworth's narrow model rarely observed statistically significant pay differences.¹⁰⁷ The parties acknowledged to the court that the case will likely be a duel between the statistical experts.¹⁰⁸

It appears, however, that the plaintiffs' expert, Dr. Drogin, makes a more reasoned and persuasive statistical analysis of Wal-Mart's employment practices. In EEOC v. Sears,¹⁰⁹ another gender discrimination case which used statistical evidence, the focus was on employment practices throughout the entire company, not department by department. It is not logical to break the Wal-Mart employees down by individual department, as Dr. Haworth has done. Under Dr. Haworth's analysis, employees in each unit were not compared with employees in other units. For example, employees of the jewelry department, which are overwhelmingly female, are not compared with employees of other departments, even though jewelry department employees perform the same kind

¹⁰⁶ Plaintiff's Reply in Support of Their Motion for Class Certification, July 25, 2003.

¹⁰⁷ Plaintiffs' Reply in Support of Their Motion for Class Certification, July 25, 2003.

¹⁰⁸ Oral argument regarding Class Certification, September 24, 2003, page 30, lines 19-25

¹⁰⁹ 839 F.2d 302 (7th Cir. 1988)

of sales work as employees in other departments. Dr. Haworth's analysis also fails to address the frequent movement of employees between departments.

The trial judge made only a limited review of the statistical evidence at this point in the case. However, the trial judge's order regarding class certification states that the plaintiffs' statistics are "largely uncontested" and show that:

[W]omen working in Wal-Mart stores are paid less than men in ever region, that pay disparities exist in most job categories, that the salary gap widens over time even for men and women hired into the same jobs at the same time, that women take longer to enter into management positions, and that the higher one looks in the organization the lower the percentage of women.¹¹⁰

The plaintiffs in Dukes v. Wal-Mart have bolstered their statistical evidence by providing the declarations of 110 women in 30 states whose stories explain this case in human terms that the numbers cannot convey. For example, one female employee was told she got paid less than a less qualified male because she "didn't have the right equipment."¹¹¹

The evidence contained in these declarations shows an openly hostile and discriminatory environment. Some of the more egregious examples include:

Kathleen Macdonald, Aiken, S.C., complained about earning less than men and her department manager told her women would never made as much as men because "God made Adam first."¹¹²

Ramona Scott, Florida, told by store manager, "Men are here to make a career and women aren't. Retail is for housewives who just need to earn extra money."¹¹³

¹¹⁰ Dukes v. Wal-Mart, No. C 01-02252 MJJ, Order Granting in Part and Denying in Part motion for Class Certification, page 28, available at <http://www.cand.uscourts.gov/cand/judges.nsf/bc370270\4eecd8588256d480060b71b?OpenView>, last visited June 22, 2004.

¹¹¹ Plaintiff's Press Release, dated April 28, 2003, "Plaintiff's Motion for Class Certification Seeks Trial for More than 1.5 Million Current and Former Wal-Mart Employees," available at <http://www.walmartclass.com>, last visited June 23, 2003.

¹¹² Plaintiff's Class Action Brief, April 28, 2003.

¹¹³ Plaintiff's Class Action Brief, April 28, 2003.

Melissa Howard, Indiana, District lunch meetings were sometimes held at a Hooters restaurant and a business trip supervised by male managers included stops at several strip clubs.¹¹⁴

As the case proceeds to trial, these statements, and many others like them, could have a powerful impact at trial. A jury confused by "dueling statistical experts" could be persuaded to find for the plaintiffs after a parade of witnesses testify about these types of events. One could argue it would not be appropriate to offer the testimony of a few hundred women who faced discrimination among a class that could reach 2.5 million. However, Wal-Mart would have the opportunity to cross-examine each of these witnesses and could call its own witnesses in efforts to prove it did not discriminate. The testimony of the many women who actually faced discrimination is likely to provide further incentive for Wal-Mart to settle this case.

It is difficult to evaluate the merits of Dukes v. Wal-Mart before a single witness has been called. However, there are many similarities between the Wal-Mart case and a class action involving Home Depot.

Sex discrimination class action lawsuits were filed against Home Depot in 1994.¹¹⁵ The primary allegation in the Home Depot case was that women were routinely assigned to cashier positions and were not allowed to work on the sales floor where promotions and higher pay were more likely. There are many similarities between the Home Depot case and Dukes v. Wal-Mart. In both cases, the plaintiffs relied upon statistical disparity in the workforce makeup. According to the Home Depot plaintiffs, 70 percent of the employees in jobs such as cashiers were women, while 94 percent of the

¹¹⁴ Bob Egelko, *Sex discrimination cited at Wal-Mart*, THE SAN FRANCISCO CHRONICLE, April 29, 2003.

¹¹⁵ Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and Its Effects*, 81 Tex. L. Rev. 1249, 1281-1287 (April 2003).

store managers were men.¹¹⁶ The Home Depot plaintiffs also submitted anecdotal evidence of specific instances of discrimination suffered by individual plaintiffs. Home Depot's defense was very similar to Wal-Mart's--explaining the workforce disparities by arguing that women were not interested in working on the sales floor but routinely applied for cashier positions. The Home Depot case settled just three days before trial with Home Depot agreeing to pay a combination of damages and attorney's fees of \$104 million.¹¹⁷

The similarities between the Dukes v. Wal-Mart and the Home Depot case are striking--the plaintiffs are asserting very similar statistical and anecdotal evidence and the defenses from the employers are almost identical. The Wal-Mart class of plaintiffs is much larger than that which Home Depot faced. However, since the Home Depot case settled, the merits of the case were not tested before a judge or jury.

The only real insight that can be gleaned from the Home Depot case is that since the Wal-Mart class action has been certified, a settlement in excess of \$100 million is likely. Indeed, a review of past employment discrimination class action cases shows the potential settlement range in Dukes v. Wal-Mart could be in the billions of dollars.

Defendant, year	Class Size	Settlement
State Farm, 1992	1000	\$157 million
U.S. Information Agency, 2000	1100	\$508 million
Texaco, 1996	1500	\$176 million

¹¹⁶ Chris Roush, *Focus on Discrimination Case, Both Sides Confident*, ATLANTA JOURNAL-CONSTITUTION, March 4, 1997, F8.

¹¹⁷ See Joint Report to the Court Regarding the Status of the Implementation of the Consent Decree and the Distribution of the Settlement Fund, at 2, Butler v. Home Depot, Inc., No. 94-4335 SI (N.D. Cal. Jan. 14, 1998).

Coca Cola, 2000	2000	\$192 million
Home Depot, 1998	25,000	\$104 million
Shoney's, 1993	50,000	\$132 million
Wal-Mart, 2004	1.6 million	Pending ¹¹⁸

Although Wal-Mart will not be eager to settle, the risk of proceeding to trial under this facts, with 1.6 million plaintiffs, each of whom could possibly recover up to \$300,000,¹¹⁹ may simply be too great for Wal-Mart.

3. Forced Overtime Without Pay

Wal-Mart faces nearly 40 lawsuits claiming it forced employees to work overtime without pay.¹²⁰ These lawsuits claim that Wal-Mart holds labor costs down by forcing employees to work through breaks and before or after their shifts. The lawsuits also allege that Wal-Mart doctors time cards to avoid paying overtime and keeps clocked-out graveyard shift employees locked in stores until a manager lets them out.¹²¹

Wal-Mart has already lost one of these forced overtime cases. A jury in Oregon in December 2002 found that company managers had coerced nearly 400 employees to work overtime without pay from 1994 to 1999.¹²² Witnesses at the trial said the managers were driven by intense pressure from corporate headquarters to cut labor costs. Managers whose labor costs were considered too high were singled out during the

¹¹⁸ Amy Joyce, *Wal-Mart Bias Case Moves Forward*, THE WASHINGTON POST, June 23, 2004, page A8.

¹¹⁹ 42 U.S.C. Sec. 1981a (2002).

¹²⁰ Jack Z. Smith, *Up against the Wal-Mart*, FORT-WORTH STAR-TELEGRAM, December 5, 2003.

¹²¹ Jennifer Dixon, *Wal-Mart Denies Abusing Workers*, DETROIT FREE PRESS, October 9, 2002.

¹²² Jeff Manning, *Jury Finds Wal-Mart Broke Laws on Overtime*, THE OREGONIAN, December 20, 2002.

company's weekly in-house satellite broadcasts.¹²³ In response, managers tampered with electronic time cards or bullied employees to work off the clock, according to trial testimony.¹²⁴ The Oregon jury found last December that Wal-Mart's behavior was illegal and willful.¹²⁵ At the damages phase of that trial, a different jury found that 83 workers from this case were entitled to payments. Exact compensation for each worker is still being determined. Payments should range from a few hundred dollars to several thousand per worker, based on roughly 30 to 60 minutes of overtime per week.¹²⁶

Two similar overtime cases have been granted class action status in Minnesota and California.¹²⁷ The Minnesota class action was brought on behalf of more than 64,000 current and former hourly employees.¹²⁸ Wal-Mart is appealing against an earlier class certification in Indiana.¹²⁹

Wal-Mart paid \$500,000 to settle another overtime case in New Mexico which involved about 100 workers.¹³⁰ The company reportedly paid \$50 million two years ago to settle an off-the-clock lawsuit covering 69,000 workers in Colorado.¹³¹ Wal-Mart also

¹²³ Abigail Goldman and Nancy Cleeland, *The Wal-Mart Effect*, LOS ANGELES TIMES, November 23, 2003.

¹²⁴ Abigail Goldman and Nancy Cleeland, *The Wal-Mart Effect*, LOS ANGELES TIMES, November 23, 2003.

¹²⁵ Abigail Goldman and Nancy Cleeland, *The Wal-Mart Effect*, LOS ANGELES TIMES, November 23, 2003.

¹²⁶ No Author, *Jury Finds Wal-Mart Owes 83 Oregon Workers in Unpaid Overtime Trial*, THE CANADIAN PRESS, February 18, 2004.

¹²⁷ Neil Buckley and Caroline Daniel, *Wal-Mart vs. the Workers*, FINANCIAL TIMES, November 20, 2003.

¹²⁸ Julie Forster, *Workers Suit Against Wal-Mart to Go to Trial*, SAINT PAUL PIONEER PRESS, February 20, 2004.

¹²⁹ Neil Buckley and Caroline Daniel, *Wal-Mart vs. the Workers*, FINANCIAL TIMES, November 20, 2003.

¹³⁰ Jeff Manning, *Jury Finds Wal-Mart Broke Laws on Overtime*, THE OREGONIAN, December 20, 2002.

¹³¹ Jeff Manning, *Jury Finds Wal-Mart Broke Laws on Overtime*, THE OREGONIAN, December 20, 2002.

settled a lawsuit in Colorado with 596 pharmacists who alleged the company forced them to work overtime, unlawfully classifying them 'salaried employees.'¹³²

4. Disability Discrimination

In 2001, Wal-Mart paid \$6.8 million to settle a case brought by the EEOC which alleged that Wal-Mart's pre-employment questionnaire violated the Americans with Disabilities Act (ADA).¹³³ This settlement included 12 other ADA lawsuits filed against Wal-Mart in 11 states.

5. Employee Lock-Ins

Many Wal-Marts lock the overnight workers in to keep robbers out and, as some managers say, to prevent employee theft.¹³⁴ Management had warned the overnight workers that if they used the fire exit, they would lose their jobs. It is a policy that many employees say has created disconcerting situations, like when a worker in Indiana suffered a heart attack, when hurricanes hit in Florida and when workers' wives have gone into labor. "Locking in workers, that's more of a 19th-century practice than a 20th century one," said Burt Flickinger, who runs a retail consulting company.¹³⁵ Wal-Mart officials say the practice is only used at 10 percent of its stores to protect stores and employees in high-crime areas.¹³⁶

6. Using Illegal Immigrants to Clean the Stores

In October 2003, federal agents raided 60 Wal-Mart stores in 21 states and arrested more than 250 illegal immigrants from 18 countries working in the stores as

¹³² Cindy Rodriguez, *Wal-Mart's bargains may prove costly*, DENVER POST, December 15, 2003.

¹³³ ADA, Pub. L. No. 101-336, prohibits employment discrimination against persons with disabilities. 42 U.S.C. Sec. 1211 et. seq.; EEOC Press Release, "Comprehensive EEOC, Wal-Mart Settlement Resolves Disability Lawsuit," December 17, 2001, available at <http://www.eeoc.gov/press/12-17-01.html>.

¹³⁴ Steven Greenhouse, *Lock-ins concern Wal-Mart workers*, NEW YORK TIMES, January 18, 2004.

¹³⁵ Steven Greenhouse, *Lock-ins concern Wal-Mart workers*, NEW YORK TIMES, January 18, 2004.

¹³⁶ Steven Greenhouse, *Lock-ins concern Wal-Mart workers*, NEW YORK TIMES, January 18, 2004.

janitors.¹³⁷ Ten of those arrested were employed directly by Wal-Mart, the rest worked for contractors hired by the company.¹³⁸ A grand jury is investigating whether Wal-Mart knew that janitors provided by subcontractors were illegal immigrants cheated out of overtime pay. Federal agents have seized boxes of documents from the Bentonville headquarters. Wal-Mart has denied wrongdoing.¹³⁹ Federal officials have confirmed they have recorded conversations indicating that Wal-Mart employees knew illegal workers were being used.¹⁴⁰

In a related case in New Jersey, 17 illegal immigrants have brought a civil racketeering suit against Wal-Mart alleging that the company required them to work seven days a week without overtime pay and for salaries that worked out to less than the minimum wage.¹⁴¹

7. "Dead Peasant" Life Insurance Policies

Wal-Mart faces several class action lawsuits for purchasing Corporate-Owned Life Insurance (COLI) policies on the lives of its employees.¹⁴² In the early 1990s, Wal-Mart took out 350,000 life insurance policies on the lives of its employees payable to the company.¹⁴³ Wal-Mart received between \$65,000 and \$80,000 when each of its hourly

¹³⁷ Editorial, *Cost benefits?*, THE RECORD, NEW JERSEY, April 8, 2004.

¹³⁸ Leigh Strope, *Workers rally as part of nationwide pro-union day* ASSOCIATED PRESS, December 11, 2003.

¹³⁹ Abigail Goldman and Nancy Cleeland, *The Wal-Mart Effect*, LOS ANGELES TIMES, November 23, 2003.

¹⁴⁰ Neil Buckley and Caroline Daniel, *Wal-Mart vs. the Workers*, FINANCIAL TIMES, November 20, 2003.

¹⁴¹ Joao-Pierre S. Ruth, *The Behemoth Comes to the Grocery Aisle*, NJBIS, April 12, 2004.

¹⁴² Wal-Mart 2004 Annual Report for Investors, available at http://media.corporate-ir.net/media_files/irol/11/112761/reports/wmt_040704.pdf

¹⁴³ Mayo v. Hartford Life Insurance, 354 F.3d 400, 401 (5th Cir. 2004)

wage workers died and hundreds of thousands of dollars when each of its management employees died. Many employees never knew about the policies.¹⁴⁴

Wal-Mart borrowed money from the insurers to pay the premiums, which the company was able to deduct from federal tax payments as a business expense. After Congress and the IRS eliminated the tax advantages of Wal-Mart's COLI program in 2000, Wal-Mart stopped the practice.¹⁴⁵

One of the class actions arose in Texas and involved Douglas Sims, a 12 year Wal-Mart employee who was covered by a Wal-Mart COLI without his knowledge. Sims died in 1999 and the insurance policy paid \$64,000 to the company. When Sims' family discovered the existence of this policy and received no benefits, they sued Wal-Mart seeking rights under the policy.¹⁴⁶ The trial court granted partial summary judgment to Sims' family because under Texas law, Wal-Mart did not have an insurable interest in Sims' life. Wal-Mart appealed to the 5th Circuit and then settled the case in January 2004, just hours before the appellate court ruled against the retailer and affirmed the lower court's ruling.¹⁴⁷ The terms of that settlement could affect up to 450 families of Wal-Mart employees.¹⁴⁸

8. Child Labor Law Violations -

An internal audit conducted by the company in July 2000 detailed 1,371 violations of child-labor laws, including minors working too late, too many hours in a day

¹⁴⁴ L.M. Sixel, *Wal-Mart settles insurance lawsuit / Dead peasant policies angered kin*, HOUSTON CHRONICLE, January 9, 2004.

¹⁴⁵ *Mayo v. Hartford Life Insurance*, 354 F.3d 400, 401 (5th Cir. 2004)

¹⁴⁶ *Mayo v. Hartford Life Insurance*, 354 F.3d 400, 402 (5th Cir. 2004)

¹⁴⁷ *Mayo v. Hartford Life Insurance*, 354 F.3d 400, 402 (5th Cir. 2004); L.M. Sixel, *Wal-Mart settles insurance lawsuit / Dead peasant policies angered kin*, HOUSTON CHRONICLE, January 9, 2004. Wal-Mart claimed that COLIs were used by many large corporations.

¹⁴⁸ L.M. Sixel, *Wal-Mart settles insurance lawsuit / Dead peasant policies angered kin*, HOUSTON CHRONICLE, January 9, 2004.

or during school hours. The audit was distributed to top Wal-Mart executives and emerged in lawsuits against the company.¹⁴⁹ Wal-Mart responded by saying the audit was not a valid study and should not be taken at face value. James Finberg, an attorney who represents Wal-Mart employees in a pending class action regarding overtime pay, said the audit shows Wal-Mart broke its own rules. "The policy book says the right things, but the pattern and practice is clear--managers tell people to do the work, no matter how long it takes, and they tell them they're not going to pay them overtime."¹⁵⁰

All of these actions by Wal-Mart shows the company has a track record of treating its employees badly. Taken collectively, these actions illustrate that the foursquare deal Sam Walton made with his employees no longer means what it once did. Given the sheer number and variety of labor and employment law violations Wal-Mart has committed against its employees, it may just be a matter of time before the employees decide to unionize.

¹⁴⁹ Associated Press, *Audit Details Violations at Wal-Mart*, LOS ANGELES TIMES, January 14, 2004.

¹⁵⁰ Associated Press, *Audit Details Violations at Wal-Mart*, LOS ANGELES TIMES, January 14, 2004.

Part III - Larger impacts of Wal-Mart on America's Economy

1. A Shift in the U.S. Economy -

Wal-Mart's impact on the American workplace goes beyond its own 1.2 million employees. The company's explosive growth comes at a time of change in the U.S. economy and the continuing shift from the manufacturing base that helped the country prosper in the decades following World War II into a service-based economy. In 1953, manufacturing jobs made up 35 percent of the U.S. economy.¹⁵¹ Today, manufacturing jobs represent less than 12 percent of all U.S. employment.¹⁵²

"When General Motors was the largest corporation, they raised the bar on health insurance and worker pay," said Denver city Councilwoman Kathleen Mackenzie who is reviewing a Wal-Mart development. "Large, unionized companies were the leaders in health care, pay and insurance. It seems to me that Wal-Mart is lowering the bar in worker treatment. I'm sad about that, and I worry that the low prices Wal-Mart is able to offer may be pretty expensive for our nation over time, as we have to subsidize people in a variety of ways."¹⁵³

At the same time U.S. manufacturing jobs are declining, the service industry continues to grow. In the decade that will end in 2010, the Bureau of Labor Statistics figures that goods-producing industries will create 1.3 million new jobs, compared to 20 million for service industries.¹⁵⁴ Today, there are about four times as many people

¹⁵¹ Cait Murphy, *Wal-Mart Rules*, FORTUNE MAGAZINE, April 15, 2002.

¹⁵² U.S. Department of Labor, Bureau of Labor Statistics, *Industry at a Glance, Manufacturing*, available at <http://www.bls.gov/iag/manufacturing.htm>.

¹⁵³ Rob Reuteman, *Is Wal-Mart Really A Wolf In Sheep's Clothing*, ROCKY MOUNTAIN NEWS, October 25, 2003.

¹⁵⁴ U.S. Department of Labor, Bureau of Labor Statistics, *Industry at a Glance, NAICS 31-33: Manufacturing*, available at <http://www.bls.gov/iag/manufacutring.htm>.

working in service jobs as in other kinds of jobs.¹⁵⁵ Over the next few years, only three of the ten fastest-growing occupations (software engineers, nurses, and computer support) pay middle-class salaries. The rest could be called "Wal-Mart" kind of jobs--cashiers, retail assistants and food service.¹⁵⁶ The shift from manufacturing jobs to service-based jobs means a drop in pay for many workers. Average hourly earnings of workers in manufacturing in 2003 was \$15.74.¹⁵⁷ Average hourly earnings of nonsupervisory worker in retail trade is \$11.90.¹⁵⁸ Retail wages are not expected to grow. Hourly retail pay grew only 1 percent from February 2003 to February 2004, compared to a 1.7 percent gain for private sector jobs overall.¹⁵⁹

Since 2001, some 2.9 million private sector jobs have been lost, according to the Bureau of Labor Statistics.¹⁶⁰ It is the men and women in manufacturing jobs who are most affected by structural change. Of the 2.9 million private-sector jobs that have been lost since 1991, a full 2.56 million are from manufacturing.¹⁶¹

There has been good news recently on job creation in America. Employers added 288,000 jobs in April 2004¹⁶² and 248,000 jobs in May 2004.¹⁶³ Smaller job gains were

¹⁵⁵ Cait Murphy, *Wal-Mart Rules*, FORTUNE MAGAZINE, April 15, 2002.

¹⁵⁶ Department of Labor, Table 3c. The 10 occupations with the largest job growth, 2002-2012, available at <http://www.bls.gov/news.release/ecopro.t05.htm>

¹⁵⁷ U.S. Department of Labor, Bureau of Labor Statistics, Industry at a Glance, NAICS 31-33: Manufacturing, available at <http://www.bls.gov/iag/manufacutring.htm>.

¹⁵⁸ U.S. Department of Labor, Bureau of Labor Statistics, Industry at a Glance, NAICS 42-45: Wholesale and retail trade, available at <http://www.bls.gov/iag/wholretailtrade.htm>.

¹⁵⁹ Ann Zimmerman, *Costco's Dilemma: Be Kind to its workers or Wall Street*, THE WALL STREET JOURNAL, March 26, 2004.

¹⁶⁰ Leslie Haggin Geary, *Vanishing Jobs*, CNN/MONEY, January 7, 2004, available at http://money.cnn.com/2003/12/17/pf/q_nomorework/index.htm

¹⁶¹ Leslie Haggin Geary, *Vanishing Jobs*, CNN/MONEY, January 7, 2004, available at http://money.cnn.com/2003/12/17/pf/q_nomorework/index.htm; U.S. Department of Labor, Bureau of Labor Statistics, Industry at a Glance, NAICS 31-33: Manufacturing, available at <http://www.bls.gov/iag/manufacutring.htm>

¹⁶² Nell Henderson and Amy Joyce, *U.S. Job Creation in April Gives Strength to Recovery*, THE WASHINGTON POST, May 8, 2004, Page A-1.

¹⁶³ U.S. Department of Labor, Bureau of Labor Statistics, Employment Situation Summary, June 4, 2004, available at <http://www.bls.gov/news.release/empstat.nr0.htm>.

seen in manufacturing with a total increase of 20,000 jobs in April 2004¹⁶⁴ and an increase of 32,000 jobs in May 2004.¹⁶⁵ Since January 2004, manufacturing employment has added a total of 91,000 jobs.¹⁶⁶ Before 2004, manufacturing had gone through 43 consecutive months of job loss.¹⁶⁷

Some of the recent increases in manufacturing jobs could be due to war spending. The Commerce Department attributes nearly 16 percent of the nations' economic growth to increased defense spending as conflicts in Iraq and Afghanistan drive demand for body armor, military uniforms and heavily armored vehicles made in the U.S.¹⁶⁸ It is impossible to know how many of the jobs created in recent months are defense-related since the Labor Department does not track defense contractor employment. However, the Commerce Department reports that in the first three months of 2004, defense work accounted for nearly 16 percent of the nation's economic growth.¹⁶⁹ The Department of Labor does report that most of the gains in manufacturing jobs occurred in fabricated metal products and machinery,¹⁷⁰ areas which support defense spending.

Even with increased war spending, jobs in retail trade and food services, which traditionally offer low pay and poor benefits, are still growing more rapidly than almost any other job category. The Department of Labor estimates that a total of 142,000 jobs in

¹⁶⁴ Nell Henderson and Amy Joyce, *U.S. Job Creation in April Gives Strength to Recovery*, THE WASHINGTON POST, May 8, 2004, Page A-1.

¹⁶⁵ U.S. Department of Labor, Bureau of Labor Statistics, Employment Situation Summary, June 4, 2004, available at <http://www.bls.gov/news.release/empstat.nr0.htm>.

¹⁶⁶ U.S. Department of Labor, Bureau of Labor Statistics, Employment Situation Summary, June 4, 2004, available at <http://www.bls.gov/news.release/empstat.nr0.htm>.

¹⁶⁷ Nell Henderson and Amy Joyce, *U.S. Job Creation in April Gives Strength to Recovery*, THE WASHINGTON POST, May 8, 2004, Page A-1.

¹⁶⁸ Jonathan Weisman, *Across America, War Means Jobs*, THE WASHINGTON POST, May 11, 2004.

¹⁶⁹ Jonathan Weisman, *Economy Provides No Boost for Bush*, THE WASHINGTON POST, June 10, 2004, page A1.

¹⁷⁰ Employment Situation Summary, Department of Labor, May 7, 2004, available at <http://www.bls.gov/news.release/empstat.nr0.htm>.

retail have been added since January 2004.¹⁷¹ Food service jobs have also grown rapidly. Since the beginning of 2004, employment in food services has increased by an average of 32,000 a month, more than double the average monthly increase in 2003.¹⁷²

Since the majority of industries with projected growth are in the service industry where many of the jobs offer less pay, some American workers are making difficult choices. One option many are choosing is to work reconstruction jobs in Iraq as civilian contractors for Halliburton Corporation's Engineering and Construction Group, known as Kellogg Brown and Root (KBR). KBR has 24,000 workers in Iraq, about half of them from the U.S.¹⁷³ Many of the KBR recruits are working poor.¹⁷⁴ These workers are willing to dare the hardship of 12-14 hour days seven days a week, and the risk of kidnapping or death to bring back \$80,000 to \$100,000 in a year. Even with the continuing violence against U.S. civilians in Iraq in April 2004, KBR has thousands of resumes on file and the company is processing 400 to 500 workers a week to go to Iraq.¹⁷⁵ Michael Doerschuk, a KBR recruit said, "I'm tired of living paycheck to paycheck," he said. "I could do this a year and be debt free."¹⁷⁶

¹⁷¹ Employment Situation Summary, Department of Labor, May 7, 2004, available at <http://www.bls.gov/news.release/empstat.nr0.htm>; U.S. Department of Labor, Bureau of Labor Statistics, Employment Situation Summary, June 4, 2004, available at <http://www.bls.gov/news.release/empstat.nr0.htm>.

¹⁷² U.S. Department of Labor, Bureau of Labor Statistics, Employment Situation Summary, June 4, 2004, available at <http://www.bls.gov/news.release/empstat.nr0.htm>.

¹⁷³ Jackie Spinner, *War Dangers Don't Deter U.S. Workers*, THE WASHINGTON POST, page A-1, May 17, 2004.

¹⁷⁴ Jackie Spinner, *War Dangers Don't Deter U.S. Workers*, THE WASHINGTON POST, page A-1, May 17, 2004.

¹⁷⁵ Jackie Spinner, *War Dangers Don't Deter U.S. Workers*, THE WASHINGTON POST, page A-1, May 17, 2004.

¹⁷⁶ Jackie Spinner, *War Dangers Don't Deter U.S. Workers*, THE WASHINGTON POST, page A-1, May 17, 2004.

2. Outsourcing Manufacturing Jobs to China

One of the better examples of what I'm talking about is our Bring it Home to the U.S.A. program, which we started in 1985 in response to the soaring U.S. trade deficit . . . So our primary goal became to work with American manufacturers, and see if our formidable buying power could help them deliver the goods and, in the process, save some American manufacturing jobs. . . . (W)e developed a formula which enabled us to make a true apples-to-apples cost comparison of buying something overseas versus buying it at home. Now, if we can get within 5 percent of the same price and quality, we take a smaller markup and go with the American product. . . . With this approach, we estimate we have saved or created almost 100,000 American manufacturing jobs. -Sam Walton¹⁷⁷

Despite the noble ideals of its founder, Wal-Mart is partially responsible for the recent loss of manufacturing jobs in the U.S. The size of the retailer has made it a global economic force. Wal-Mart's decisions affect wages, working conditions and manufacturing practices around the world. In 1985, Walton launched his "Bring It Home to the USA" program. Since Walton's death, however, the company has become China's biggest customer as Wal-Mart imports cheap goods to sell at bottom line prices to U.S. consumers.¹⁷⁸ The company established its own global procurement division to hunt for the cheapest raw materials, manufacturers and shipping routes.¹⁷⁹

The retailer demands such low prices from suppliers that it has forced some of its formerly U.S. suppliers to move production overseas. Businesses that supply the goods Wal-Mart sells say they have no choice but to move production to other countries because Wal-Mart never lets up in its demand for lower and lower prices.¹⁸⁰ Wal-Mart's drive for the lowest price has been blamed for forcing suppliers to pay workers pennies

¹⁷⁷ Sam Walton with John SAM WALTON & JOHN HUEY, *MADE IN AMERICA, MY STORY*, 241-242 (1992).

¹⁷⁸ Nancy Cleeland, Evelyn Iritani and Tyler Marshall, *The Wal-Mart Effect*, LOS ANGELES TIMES, November 24, 2003.

¹⁷⁹ Nancy Cleeland, Evelyn Iritani and Tyler Marshall, *The Wal-Mart Effect*, LOS ANGELES TIMES, November 24, 2003.

¹⁸⁰ Jerry Large, *Wal-Mart's low prices at high cost*, THE SEATTLE TIMES, December 4, 2003.

for long hours in poor conditions.¹⁸¹ The company, which once bragged of buying American-made products, bought \$12 billion in goods from China in 2002 -- a tenth of the U.S. imports from that nation.¹⁸² In 2003, Wal-Mart spent \$15 billion on Chinese-made products, accounting for nearly one eighth of all Chinese exports to the United States.¹⁸³

A supplier of fans to Wal-Mart, Lakewood Engineering and Manufacturing Company provides an example. A decade ago, fans produced by Lakewood in the U.S. carried a \$20 price tag. Today the same fan sells at Wal-Mart for \$10.¹⁸⁴ The \$20 price was too high for Wal-Mart, so Lakewood owner Carl Krauss cut costs at every turn. He automated production at the factory built by his grandfather. Where it once took 22 people to put together a product, it now takes seven. Krauss also badgered his suppliers to knock down their prices for parts. In 2000, he took the hardest step of all: He opened a factory in Shenzhen, China, where workers earn 25 cents an hour, compared with \$13 in Chicago.¹⁸⁵ About 40 percent of his products now are made in China, including most heaters and desktop fans. The box fan was assembled in Chicago, but its electronic components were imported.¹⁸⁶

¹⁸¹ Jerry Large, *Wal-Mart's low prices at high cost*, THE SEATTLE TIMES, December 4, 2003.

¹⁸² Jack Z. Smith, *Up against the Wal-Mart*, FORT-WORTH STAR-TELEGRAM, December 5, 2003; Anthony Bianco and Wendy Zellner, *Low prices are great. But Wal-Mart's dominance creates problems--for suppliers, workers, communities, and even American culture; Is Wal-Mart Too Powerful?*, BUSINESS WEEK Monday, October 6, 2003.

¹⁸³ Peter S. Goodman and Philip P. Pan, *Chinese Workers Pay for Wal-Mart's Low Prices*, THE WASHINGTON POST, February 8, 2004, page A-3.

¹⁸⁴ Abigail Goldman and Nancy Cleeland, *The Wal-Mart Effect*, LOS ANGELES TIMES, November 23, 2003.

¹⁸⁵ Abigail Goldman and Nancy Cleeland, *The Wal-Mart Effect*, LOS ANGELES TIMES, November 23, 2003.

¹⁸⁶ Abigail Goldman and Nancy Cleeland, *The Wal-Mart Effect*, LOS ANGELES TIMES, November 23, 2003.

All the retailers Krauss supplies--including Home Depot and Target--drive a hard bargain with manufacturers. But none is as tough as Wal-Mart, Krauss said.¹⁸⁷ Twice a year, his sales representatives travel to Wal-Mart headquarters to pitch their products. There, competitors sit side by side, waiting to be ushered into one of the 60 glass-sided cubicles. Then the haggling begins. "You give them your price," Krauss said. "If they don't like it, they give you theirs." The suppliers are at a disadvantage. The Wal-Mart buyer can always go out to the waiting room and find someone who will go lower. "Your price is going to be whittled down like you never thought possible," Krauss said.¹⁸⁸

The loss of U.S. manufacturing jobs to China is a vicious cycle. China's workers are desperate for jobs and will work for pennies an hour. American workers real wages have dropped and left them desperate for cheap goods. Americans would rather work at Wal-Mart's non-union jobs, with low wages and poor benefits, than have no work at all. Because decent-paying working and middle-class American jobs are harder to come by, shoppers cannot afford to shop anywhere other than Wal-Mart, so they buy goods made overseas for a fraction of what they cost to make in the U.S. That encourages U.S. manufacturers to shut factories in the U.S. down and more work is sent overseas.

China is the world's most populous country, with most of its population still poor enough to willingly move hundreds of miles from home for jobs that would be shunned by anyone with better prospects. The Communist Party government has become a facilitator of capitalist production, beckoning multinational giants with tax-free zones and harsh punishment for anyone with designs on organizing a labor movement. More than

¹⁸⁷ Abigail Goldman and Nancy Cleeland, *The Wal-Mart Effect*, LOS ANGELES TIMES, November 23, 2003.

¹⁸⁸ Abigail Goldman and Nancy Cleeland, *The Wal-Mart Effect*, LOS ANGELES TIMES, November 23, 2003.

80 percent of the 6,000 factories in Wal-Mart's worldwide database of suppliers are in China. If the company that Sam Walton built with his "Made in America" ad campaign were itself a separate nation, it would rank as China's fifth-largest export market, ahead of Germany and Britain.¹⁸⁹

Typically, a U.S. or Western European factor worker costs an employer \$15 to \$30 per hour. A Chinese factory worker earns the equivalent of less than \$1 per hour.¹⁹⁰ China also offers other incentives to Western companies: low-cost land, low import duties and tax breaks. One major corporation claims to have received so many incentives for one of its factories that its construction was virtually cost-free.¹⁹¹ According to the AFL-CIO, more than 700,000 U.S. workers have lost jobs over 10 years to China. The AFL claims China's workforce is so large and its labor repression so comprehensive that it is dragging down standards for the entire world economy.¹⁹² Sixty percent of the goods produced at Shenzhen Boan Fenda Industrial Company in China are for one customer: Wal-Mart, whose mastery at squeezing savings from its supply chain made it the world's largest company. "The profit is really small," said Surely Huang, a factory engineer in China, speaking of the 350,000 stereos that Fenda agreed in March to supply the retailer for \$30 to \$40 each. Huang said they sell for \$50 in the United States. "We have to constantly cut costs to satisfy Wal-Mart."¹⁹³

¹⁸⁹ Peter S. Goodman and Philip P. Pan, *Chinese Workers Pay for Wal-Mart's Low Prices*, THE WASHINGTON POST, February 8, 2004, page A-3.

¹⁹⁰ George Stalk and Dave Young, *How China Gets Our Business*, THE WASHINGTON POST, March 7, 2004, Page B-3.

¹⁹¹ George Stalk and Dave Young, *How China Gets Our Business*, THE WASHINGTON POST, March 7, 2004, Page B-3.

¹⁹² Albert B. Crenshaw, *AFL-CIO Goes After China on Labor*, THE WASHINGTON POST, March 17, 2004, page E-2.

¹⁹³ Peter S. Goodman and Philip P. Pan, *Chinese Workers Pay for Wal-Mart's Low Prices*, THE WASHINGTON POST, February 8, 2004, page A-3.

For obvious reasons, Wal-Mart has de-emphasized the "Made in America" campaign. "Where we have the option to source domestically, we do," says Ken Eaton, Wal-Mart's senior vice-president for global procurement. However, he adds, "there are certain businesses, particularly in the U.S., where you just can't buy domestically anymore to the scale and value we need."¹⁹⁴

Some economists theorize that the outsourcing of U.S. jobs to workers overseas is good for the national economy. Specifically, regarding the outsourcing of service jobs, N. Gregory Mankiw, chairman of the White House Council of Economic Advisers, stated in February 2004, that shipping jobs to low-cost countries is the "latest manifestation of the gains from trade that economists have talked about for centuries."¹⁹⁵ In recent years, companies have shipped software engineering jobs, data entry and customer service operations abroad, especially to India. Even hospitals have joined the trend, hiring radiologists on the other side of the world to read X-ray images shipped to them over the Internet.¹⁹⁶ For example, IBM reportedly plans to move several thousand programming jobs to China, India and Brazil.¹⁹⁷ Economists who claim outsourcing is good for the U.S. economy state: "I know there will be jobs in the future,"¹⁹⁸ and that workers hurt by outsourcing "can be confident that new jobs will displace old ones as they always

¹⁹⁴ Anthony Bianco and Wendy Zellner, *Low prices are great. But Wal-Mart's dominance creates problems—for suppliers, workers, communities, and even American culture; Is Wal-Mart Too Powerful?*, BUSINESS WEEK Monday, October 6, 2003.

¹⁹⁵ Jonathan Weisman, *Bush Report Offers Positive Outlook on Jobs*, THE WASHINGTON POST, Page E-1, February 10, 2004.

¹⁹⁶ Jonathan Weisman, *Bush Report Offers Positive Outlook on Jobs*, THE WASHINGTON POST, Page E-1, February 10, 2004.

¹⁹⁷ No Author, *IBM giveth, taketh away*, CNNMONEY, January 19, 2004, available at <http://money.cnn.com/2004/01/19/news/companies/ibm/index.htm?cnn=yes>

¹⁹⁸ Jonathan Weisman, *Bush Report Offers Positive Outlook on Jobs*, THE WASHINGTON POST, Page E-1, February 10, 2004 (quote by Mankiw).

have."¹⁹⁹ The problem is that the jobs promised by these economists to replace the lost jobs are never identified. The Department of Labor reports that the majority of the ten occupations with the largest projected job growth are low paying jobs that cannot be sent overseas: retail salespersons, fast food workers, cashiers, janitors, waiters and waitresses.²⁰⁰ If these are the kinds of jobs that will replace the manufacturing, computer programming, and radiologist jobs that have been sent overseas, many American workers can expect reduced wages. Wal-Mart's larger effects on the U.S. economy and union jobs also hit closer to home.

3. The California Grocery Strike/Lockout

Grocery workers nationwide are represented by the United Food and Commercial Workers union (UFCW). The union represents 1.4 million members and has a relatively short history.²⁰¹ It was created in 1979 by the merger of the retail clerks and meat cutters union.²⁰²

Over many years of hard negotiating, UFCW won and maintained premier contracts for its grocery workers.²⁰³ These jobs have long offered those without college degrees or advanced skills entrance into the middle class with better pay and benefits. The union reports an average unionized grocery worker in Northern California makes about \$14.50 an hour and receives a benefit package worth more than \$5 an hour.²⁰⁴

¹⁹⁹ Jonathan Weisman, *Bush Report Offers Positive Outlook on Jobs*, THE WASHINGTON POST, Page E-1, February 10, 2004 (quote by Federal Reserve Chairman Alan Greenspan).

²⁰⁰ Department of Labor, Table 3c. The 10 occupations with the largest job growth, 2002-2012, available at <http://www.bls.gov/news.release/ecopro.t05.htm>

²⁰¹ http://www.ufcw.org/about_ufcw/, last visited May 17, 2004.

²⁰² http://www.ufcw.org/about_ufcw/, last visited May 17, 2004.

²⁰³ Abigail Goldman and Nancy Cleeland, *The Wal-Mart Effect*, LOS ANGELES TIMES, November 23, 2003.

²⁰⁴ Alan Zibel, *Grocery industry's labor woes are rooted in Wal-Mart expansion*, OAKLAND TRIBUNE, December 21, 2003.

Wal-Mart's entry into the grocery business posed a direct threat to the unionized grocery stores. Unlike grocery competitors, Wal-Mart is not unionized and has lower labor costs than conventional grocers.²⁰⁵ At union supermarket chains, one of the fastest-rising expenses is health care. Giant and Safeway estimate that for every \$3 they spend on health care for employees, Wal-Mart spends on average \$1.²⁰⁶ John Schroeder, the negotiating representative for Ralph's Grocery during the strike, claimed that Wal-Mart pays decent wages when a store opens up and then makes cuts after local competitors have been weakened or eliminated.²⁰⁷

Wal-Mart tinkered with the idea of entering the grocery business for years, first borrowing the concept of a supercenter--180,000-square-foot units that incorporate a full-sized grocery store inside a regular discount store--from the European "hypermarket" in the late 1980s. It was in the mid-1990s, after Walton's death, that then-CEO David Glass decided to stake the company's growth on its ability to sell meat and potatoes in an expanding network of supercenters. The rationale was simple--traffic. Whereas the average shopper might come to Wal-Mart only once or twice a month, people buy groceries, on average, more than twice a week.²⁰⁸

Wal-Mart rang up \$56 billion in grocery sales in 2001, making it the nation's top ranked food retailer.²⁰⁹ The company recorded \$82 billion in grocery and drug sales in

²⁰⁵ Alan Zibel, *Grocery industry's labor woes are rooted in Wal-Mart expansion*, OAKLAND TRIBUNE, December 21, 2003.

²⁰⁶ Michael Barbaro and Neil Irwin, *The Health of Grocers, Workers*, THE WASHINGTON POST, February 17, 2004, page E-1.

²⁰⁷ David Greenberg, *Firm stance by grocers puts brakes on strike progress*, SAN DIEGO BUSINESS JOURNAL, December 8, 2003.

²⁰⁸ Brian O'Keefe, *Wal-Mart, Meet Your New Neighborhood Grocer*, FORTUNE MAGAZINE, April 28, 2002.

²⁰⁹ Brian O'Keefe, *Wal-Mart, Meet Your New Neighborhood Grocer*, FORTUNE MAGAZINE, April 28, 2002.

2002, compared to \$52 billion for Kroger, and \$29 billion for Safeway.²¹⁰ While Wal-Mart had less than 6 percent of the grocery market in 1995, analysts estimate it commanded an impressive 10.3 percent share in 2002, a figure that could rise to 15 percent as early as 2004.²¹¹ According to a study by consulting firm Retail Forward, for each Wal-Mart supercenter that opens in the next five years, two conventional supermarkets will shut their doors. The study projected that Wal-Mart's rapid expansion of supercenters will increase its share of the nationwide supermarket business to 35 percent in 2007.²¹²

Since 1996 the number of supercenters nationwide has jumped from 260 to 1,060, and the company will probably double that in the next four years. Wal-Mart is also ramping up its food distribution network. UBS Warburg's Currie predicts that the company could support as many as 4,000 supercenters across the country by 2006.²¹³

Wal-Mart's move into groceries has led 25 regional supermarket chains around the nation to close or file for bankruptcy protection, eliminating 12,000 mostly union jobs, according to Strategic Resource Group in New York.²¹⁴

In late 2002, Wal-Mart had 140 standard-sized stores in California and announced plans to move into the grocery business throughout California by opening 40

²¹⁰ Alan Zibel, *Grocery industry's labor woes are rooted in Wal-Mart expansion*, OAKLAND TRIBUNE, December 21, 2003.

²¹¹ Brian O'Keefe, *Wal-Mart, Meet Your New Neighborhood Grocer*, FORTUNE MAGAZINE, April 28, 2002.

²¹² Alan Zibel, *Grocery industry's labor woes are rooted in Wal-Mart expansion*, OAKLAND TRIBUNE, December 21, 2003.

²¹³ Brian O'Keefe, *Wal-Mart, Meet Your New Neighborhood Grocer*, FORTUNE MAGAZINE, April 28, 2002.

²¹⁴ Abigail Goldman and Nancy Cleeland, *The Wal-Mart Effect*, LOS ANGELES TIMES, November 23, 2003.

supercenters.²¹⁵ Each supercenter is said to generate \$80 million in annual sales, meaning the California additions could add another \$3.2 billion to Wal-Mart's top line.²¹⁶

Grocery chain executives from Ralph's, Vons and Albertsons saw this announcement as a sizable threat²¹⁷ and they called union leaders to a meeting to talk about the need to rein in medical benefits to compete with nonunion stores like Wal-Mart.²¹⁸ The expansion of Wal-Mart was also a threat to UFCW. With the opening of each new supercenter, the union's clout erodes. Every supercenter takes away about 200 UFCW jobs, according to retail consultant Strategic Resource Group in New York.²¹⁹ That means less power at the bargaining table and less money to hire organizers. Nevertheless, the two sides were unable to reach agreement and the union struck Vons and Pavilions on October 11, 2003.²²⁰ The next day, Ralphs and Albertsons locked out their UFCW employees.

About 70,000 workers were impacted at 852 stores in Southern and Central California. It was the region's first supermarket strike/lockout in 25 years. The key obstacle was disagreement over how much the companies should pay for workers' health-care coverage. Talks broke off in early October and the union removed its pickets from Ralphs saying it wanted to relieve consumers' inconvenience by leaving one big chain picket-free.²²¹

²¹⁵ Betsy Spethman, *California Screaming*, PROMO BUSINESS MAGAZINE, January 1, 2004.

²¹⁶ Andy Fixmer, David Greenberg, *Wal-Mart, labor massing troops*, LOS ANGELES BUSINESS JOURNAL, December 15, 2003.

²¹⁷ Abigail Goldman and Nancy Cleeland, *The Wal-Mart Effect*, LOS ANGELES TIMES, November 23, 2003.

²¹⁸ Editorial Pages Desk, *Stores, Union Striking Out*, LOS ANGELES TIMES, January 13, 2004.

²¹⁹ Abigail Goldman and Nancy Cleeland, *The Wal-Mart Effect*, LOS ANGELES TIMES, November 23, 2003.

²²⁰ Abigail Goldman and Nancy Cleeland, *The Wal-Mart Effect*, LOS ANGELES TIMES, November 23, 2003.

²²¹ James F. Peltz, *Union, Stores Reach a Deal to End Strike*, LOS ANGELES TIMES, February 27, 2004.

Talks resumed briefly in December and started again after the New Year Holiday.²²² Picket lines expanded to northern California and Washington, D.C. Safeway stores.²²³ The grocery stores brought in tens of thousands of replacement workers as the strike continued past the holidays.²²⁴ Striking workers went months without a paycheck, subsisted on modest strike-fund pay that dwindled to as little as \$100 a week and lost their company-paid health benefits December 31, 2003.²²⁵

As the strike/lockout continued, California shoppers by and large avoided the picketed stores and began shopping more frequently at smaller retailers.²²⁶ Nevertheless, the supermarkets were determined to reduce their labor costs and endured the strike/lockout as an investment in their long-term financial future.²²⁷

After 16 straight days of bargaining, the parties reached a tentative agreement on February 27, 2004. It was the longest-running strike/lockout in the history of the U.S. supermarket labor.²²⁸ UFCW and the grocery stores agreed on a two-tier system which allows existing employees to keep their wages and benefits, but permits the stores to pay new hires less per hour and to provide them skimpier health benefits than those given to veteran employees.²²⁹ The outcome showed that UFCW bargained hard to protect members on the picket lines, though at the expense of future members.²³⁰ The employee turnover rate is relatively high in the grocery business, so those new, lower-paid hires

²²² James F. Peltz, *Union, Stores Reach a Deal to End Strike*, LOS ANGELES TIMES, February 27, 2004.

²²³ Betsy Spethmann, *California Screaming*, PROMO BUSINESS MAGAZINE, January 1, 2004.

²²⁴ James F. Peltz, *Union, Stores Reach a Deal to End Strike*, LOS ANGELES TIMES, February 27, 2004.

²²⁵ James F. Peltz, *Union, Stores Reach a Deal to End Strike*, LOS ANGELES TIMES, February 27, 2004.

²²⁶ James F. Peltz, *Union, Stores Reach a Deal to End Strike*, LOS ANGELES TIMES, February 27, 2004.

²²⁷ James F. Peltz, *Union, Stores Reach a Deal to End Strike*, LOS ANGELES TIMES, February 27, 2004.

²²⁸ James F. Peltz, *Union, Stores Reach a Deal to End Strike*, LOS ANGELES TIMES, February 27, 2004.

²²⁹ James F. Peltz, *Union, Stores Reach a Deal to End Strike*, LOS ANGELES TIMES, February 27, 2004.

²³⁰ James F. Peltz, *Union, Stores Reach a Deal to End Strike*, LOS ANGELES TIMES, February 27, 2004.

could be in the majority within a few years.²³¹ The resolution also means the replacement workers hired during the strike will lose their jobs.

The California grocery strike/lockout only strengthened Wal-Mart's ability to move into California. UFCW did an adequate job of protecting their current members, but the structured settlement means that future employees of the grocery stores will take jobs that are more like those at Wal-Mart. Also, UFCW grew weaker by the strike and the union is now facing financial difficulty.²³² The union lost revenues when its workers were not collecting pay checks and at the same time paid out strike benefits. The supermarket chains together suffered more than \$1.5 billion in lost sales. The stores now face a tough fight to regain former customers and to productively reinstall a union workforce whose morale is soured by the bitter strike.²³³ Wal-Mart's planned move into California caused the strike and also helped to benefit Wal-Mart's ability to fend off UFCW and compete with the unionized grocery stores.

The solution to the problems presented by Wal-Mart is found in unionizing America's largest employer.

²³¹ James F. Peltz, *Union, Stores Reach a Deal to End Strike*, LOS ANGELES TIMES, February 27, 2004.

²³² Cora Daniels, *Unions vs. Wal-Mart*, FORTUNE, May 3, 2004.

²³³ James F. Peltz, *Union, Stores Reach a Deal to End Strike*, LOS ANGELES TIMES, February 27, 2004.

Part IV - Importance of Unions

Unionization would help to equalize the power imbalance between Wal-Mart and its employees. Organization would also likely lead to higher wages and better benefit packages for over a million American workers at Wal-Mart and eventually other service sector employers would be required to follow suit.

1. Purposes of the National Labor Relations Act (NLRA)

Employment-at-will is the rule for nearly every Wal-Mart employee and the majority of the American workforce. Under that rule, an employee can be terminated at any time for any reason or for no reason at all as long as clear public policy or anti-discrimination statutes are not violated.²³⁴ Employment-at-will is the default rule in American employment law and it has created a power imbalance between employer and employee. The sole attempt to alter the hierarchical structure of the workplace directly by the United States Congress is the NLRA, passed in 1935.²³⁵

In Section 1 of the NLRA, Congress recognized "[t]he inequality of bargaining power between employees who do not possess full freedom of association . . . and employers who are organized in the corporate [form] . . . ". The NLRA declared the policy of the U.S. to alleviate this economic power imbalance "by encouraging the practice and procedure of collective bargaining and by protecting the exercise of workers of full freedom of association, self-organization, and designation of representatives of

²³⁴ Marion G. Crain, *Building Solidarity Through Expansion of NLRA Coverage: A Blueprint for Worker Empowerment*, 74 Minn. L. Rev. 953, 957 May 1990.

²³⁵ Marion G. Crain, *Building Solidarity Through Expansion of NLRA Coverage: A Blueprint for Worker Empowerment*, 74 Minn. L. Rev. 953, 957 May 1990; NLRA, 29 U.S.C. Sec. 151-69 (1988).

their own choosing, for the purpose of negotiating the terms and conditions of their employment²³⁶

The importance of democratic employment environments was recognized by Senator Robert Wagner, the principal author of the NLRA:

We must have democracy in industry as well as in government . . . democracy in industry means fair participation by those who work in the decisions vitally affecting their lives and livelihood; and . . . the workers in our great mass production industries can enjoy this participation only if allowed to organize and bargain collectively through representatives of their own choosing.²³⁷

The U.S. Supreme Court recognized:

Long ago we stated the reason for labor organizations. We said that they were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that, if the employer refused to pay him the wages that he thought fair, he was nevertheless able to leave the employ and resist arbitrary and unfair treatment; that union was essential to give laborers opportunity to deal on an equality with their employer.²³⁸

The purpose of the NLRA was to establish a system of industrial democracy that would, through the vehicles of worker collective organization and bargaining, offer workers the opportunity to empower themselves.²³⁹ Collective bargaining was expected to provide individual employees with a vehicle to counterbalance the overwhelming power advantage enjoyed by corporate employers.²⁴⁰ Through organizational strength,

²³⁶ National Labor Relations Act, Ch. 372 Sec. 1, 49 Stat. 449 (1935), as amended, 29 U.S.C. Sec. 151-69 (1996).

²³⁷ MILTON DERBER, *THE AMERICAN IDEA OF INDUSTRIAL DEMOCRACY, 1865-1965*, at 321 (1970), quoting Senator Robert Wagner, *NEW YORK TIMES*, April 13, 1947.

²³⁸ *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937).

²³⁹ Marion G. Crain, *Building Solidarity Through Expansion of NLRA Coverage: A Blueprint for Worker Empowerment*, 74 Minn. L. Rev. 953, 957 May 1990.

²⁴⁰ Steven L. Wilborn, *Industrial Democracy and the National Labor Relations Act: A Preliminary Inquiry*, 25 B.C. L. REV. 725, 726-27 (1984).

employees would be able to influence terms and conditions of employment and share in the economic success of their employer.²⁴¹

The NLRA provides the right of employees to join, or refrain from, joining unions. It also proscribes "interference" with, or "discrimination" because of, the exercise of those rights.²⁴² The NLRA also provides for a process that enables employees to vote by secret ballot on whether they want union representation.²⁴³ The NLRA requires an employer to bargain in "good faith" with a union that represents a majority of its employees in an appropriate unit.²⁴⁴

2. Collective Voice

One of the most significant benefits employees derive from union representation is the "just cause" limitation on discipline expressly or implicitly contained in almost all bargaining agreements obtained through unionization.²⁴⁵ Without such restrictions and the accompanying grievance-arbitration enforcements procedures, most unorganized private-sector employees can be terminated at any time and for any reason not violative of a statutory prohibition. Even though a number of state courts have created an exception which precludes employee discharges that violate clear and important public policies, the public policy limitation rarely benefits lower-level personnel.

Approximately 150,000 private-sector employees are terminated each year under

²⁴¹ Charles B. Craver, *Why Labor Unions Must (And Can) Survive*, 1 U. Pa. J. Lab. & Emp. L. 15, 17 (1998).

²⁴² 29 U.S.C. Sec. 151, 157, 158(a).

²⁴³ 29 U.S.C. Sec. 159(e).

²⁴⁴ 29 U.S.C. Sec. 158(a)(5).

²⁴⁵ Charles B. Craver, *Why Labor Unions Must (And Can) Survive*, 1 U. Pa. J. Lab. & Emp. L. 15, 17 (1998).

circumstances that would be found inappropriate by arbitrators enforcing "just cause" provisions.²⁴⁶

Through the collective voice exerted by united groups, workers have advanced important noneconomic interests. Collective bargaining agreements generally preclude worker discipline except for "just cause." This protection is a stark contrast with the traditional "employment-at-will" doctrine.²⁴⁷ As stated by Professor Charles B. Craver:

Unorganized workers who lack collective voice are generally powerless to negotiate with their corporate employers over their wages, hours, and working conditions. They must accept the terms unilaterally offered or else look for alternative employment. If they are directed to submit to drug testing or to engage in particularly arduous tasks, they have no real choice but to comply. This loss of personal freedom results directly from the considerable inequality of bargaining power that exists between individual employees and corporate managers.²⁴⁸

3. Wage Premium

Unions give a wage premium to organized employees. The Bureau of Labor Statistics reports that in 2002, full-time wage and salary workers who were union members had median usual weekly earnings of \$760, compared with a median of \$599 for wage and salary workers who were not represented by unions.²⁴⁹ The primary reason for this wage premium is the ability of union members to collectively bargain with the employer regarding their terms and conditions of employment and to negotiate the

²⁴⁶ Charles B. Craver, *Why Labor Unions Must (And Can) Survive*, 1 U. Pa. J. Lab. & Emp. L. 15, 17 (1998) (Citing Jack Stieber, *Recent Developments in Employment-at-Will*, 36 LAB L.J. 557, 558 (1985)).

²⁴⁷ Charles B. Craver, *Why Labor Unions Must (And Can) Survive*, 1 U. Pa. J. Lab. & Emp. L. 15, 17 (1998) (citing RICHARD B. FREEMAN & JAMES L. MEDOFF, *WHAT DO UNIONS DO?* 151-153 (1984)).

²⁴⁸ Charles B. Craver, *Why Labor Unions Must (And Can) Survive*, 1 U. Pa. J. Lab. & Emp. L. 15, 22 (1998).

²⁴⁹ Bureau of Labor Statistics Press Release, January 21, 2004, Union Members in 2003.

highest wage possible. Instead of simply accepting what the employer offers, union workers have the ability to use their combined strength to negotiate for a higher wage.²⁵⁰

4. Other Benefits for Unionized Workers

Workers who have selected bargaining agents have enhanced their individual economic benefits. In addition to improvements in wage rates, union employees are more likely to obtain health care coverage, pension programs, supplemental unemployment benefits, day-care centers, and other important fringe benefits.²⁵¹ Union workers are 53 percent more likely to have medical insurance through their job than non-union workers²⁵² and union workers are nearly four times as likely to have a guaranteed pension.²⁵³ However, as the number of American workers who belong to a union continues to decline, so do the benefits associated with union membership.

5. Decline of Unions - In 2003, only 8.2 percent of private sector workers, a total of 9.2 million employees, were union members.²⁵⁴ That is a decrease from 8.6 percent in 2002 when 9.5 million workers belonged to a union.²⁵⁵ The 2003 statistics show a continuing decline in union membership and the lowest union density rates seen since the NLRA was passed. When the NLRA became law, labor unions had 3,584,000 members, representing 13.2 percent of the non-agricultural labor force.²⁵⁶ Initially, the NLRA

²⁵⁰ This same wage premium was seen in 2002--\$740 for union workers, as opposed to \$587 for non-union workers. Bureau of Labor Statistics Press Release, February 25, 2003, Union Members Summary. The U.S. Dept of Labor reported in July 2002, hourly earnings for a union worker was \$20.65, 25 percent more than a non-union worker doing the same job.²⁵⁰ Brendan Shriane, *Unions Adapt to a Changing World*, EVERETT BUSINESS JOURNAL, December 1, 2003.

²⁵¹ Charles B. Craver, *Why Labor Unions Must (And Can) Survive*, 1 U. Pa. J. Lab. & Emp. L. 15, 17 (1998).

²⁵² Nancy Schiffer, Associate General Counsel AFL-CIO, testimony before Subcommittee on Employer-Employee Relations Hearing on House Education and the Workforce Committee, April 22, 2004.

²⁵³ Nancy Schiffer, Associate General Counsel AFL-CIO, testimony before Subcommittee on Employer-Employee Relations Hearing on House Education and the Workforce Committee, April 22, 2004.

²⁵⁴ Bureau of Labor Statistics Press Release, January 21, 2004, Union Members in 2003.

²⁵⁵ Bureau of Labor Statistics Press Release, January 21, 2004, Union Members in 2003.

²⁵⁶ MICHAEL GOLDFIELD, *THE DECLINE OF ORGANIZED LABOR IN THE U.S.*, 10 *tbl.* 1 (1987).

helped unions grow. In 1937, Union membership rose to over 7,000,000.²⁵⁷ By the mid-1950s, union membership exceeded 17,000,000 and comprised nearly 35 percent of non-agricultural workers.²⁵⁸ That was the peak for union density rates and since then, union membership has been in a decline.

Union membership in the U.S. exceeded 19 million in 1970, much of the growth coming in the public sector. However, the workforce expanded faster than unionization; the proportion of the nonagricultural workforce comprised of union members declined to 27.3 percent in 1970, 23.0 percent in 1980 and 16.1 percent in 1990.²⁵⁹

By 1996, private sector union membership had declined to 9,400,000, comprising a mere 10.2 percent of non-agricultural workers.²⁶⁰ By 1999, private sector union membership constituted 9.6 percent of workforce participants. In 2002, workers in the private sector had a union membership rate of just 8.6 percent and that number dropped to 8.2 percent in 2003. The rate for private industry workers has fallen by nearly half since 1983.²⁶¹ Over 90 percent of private sector workers are most likely employed at will and do not enjoy the wage premium and other benefits of union membership.

At the same time union membership has been steadily declining, corporate profits have doubled, enhancing stock prices and firm dividends. The compensation levels of corporate managers have increased dramatically.²⁶² The New York Times has reported

²⁵⁷ ST. ANTOINE, CRAVER, CRAIN, LABOR RELATIONS LAW: CASES AND MATERIALS, Tenth Edition, page 36 (1999)

²⁵⁸ MICHAEL GOLDFIELD, THE DELINCE OF ORGANIZED LABOR IN THE U.S., 10 *tbl.* 1 (1987).

²⁵⁹ ST. ANTOINE, CRAVER, CRAIN, LABOR RELATIONS LAW: CASES AND MATERIALS, Tenth Edition, page 45 (1999)

²⁶⁰ See Unions: Union Membership Declines by 100,000 to 16.3 Million, or 14.5 Percent of Workforce, *Daily Lab. Rep. (BNA)* No. 19, at D-14 (Jan. 29, 1997).

²⁶¹ Bureau of Labor Statistics Press Release, February 25, 2003, Union Members Summary.

²⁶² Charles B. Craver, *Why Labor Unions Must (And Can) Survive*, 1 *U. Pa. J. Lab. & Emp. L.* 15, 22 (1998) (Citing Daniel Pederson, *Big Brown's Union Blues*, *NEWSWEEK*, August 8, 1997, at 50).

that since from 1982 to 1997, executive compensation has increased 182 percent while corporate revenues have risen by 127 percent.²⁶³ At the same time, real wage rates for employees have stagnated or even declined.²⁶⁴ Without unionization, employees lack the power to demand and obtain their fair share of increased corporate profits and have been left behind.²⁶⁵

There are many potential reasons for the decline in union membership, including a negative public image associated with organized labor and the idea that union membership has a "lower class" connotation,²⁶⁶ the federal government's handling of the illegal air traffic controller strike in 1981 which sent signals to the private sector encouraging union resistance,²⁶⁷ changing demographic, industrial, and technological conditions,²⁶⁸ the migration of jobs and people from the Northeast and North Central states to the Southern and Southwestern states where unions receive less support,²⁶⁹ an increase in nonunion white-collar and service sector positions,²⁷⁰ and the law's inability to adapt to our nation's shift to a service sector economy and corresponding changes in the demographics of labor force participation.²⁷¹

²⁶³ No Author, *Unions Gather Strength, But So Do Executives*, NEW YORK TIMES, September 7, 1997, Sec. 3 at 2.

²⁶⁴ Charles B. Craver, *Why Labor Unions Must (And Can) Survive*, 1 U. Pa. J. Lab. & Emp. L. 15, 22 (1998) (Citing Daniel Pederson, *Big Brown's Union Blues*, NEWSWEEK, August 8, 1997, at 50).

²⁶⁵ Charles B. Craver, *Why Labor Unions Must (And Can) Survive*, 1 U. Pa. J. Lab. & Emp. L. 15, 23 (1998).

²⁶⁶ CHARLES B. CRAVER, CAN UNIONS SURVIVE? THE REJUVENATION OF THE AMERICAN LABOR MOVEMENT, 51-55 (1993).

²⁶⁷ Charles B. Craver, *Why Labor Unions Must (And Can) Survive*, 1 U. Pa. J. Lab. & Emp. L. 15, 16 (1998).

²⁶⁸ Charles B. Craver, *Why Labor Unions Must (And Can) Survive*, 1 U. Pa. J. Lab. & Emp. L. 15, 17 (1998).

²⁶⁹ Charles B. Craver, *Why Labor Unions Must (And Can) Survive*, 1 U. Pa. J. Lab. & Emp. L. 15, 17-18 (1998).

²⁷⁰ Charles B. Craver, *Why Labor Unions Must (And Can) Survive*, 1 U. Pa. J. Lab. & Emp. L. 15, 17 (1998); CHARLES HECKSCHER, THE NEW UNIONISM: EMPLOYEE INVOLVEMENT IN THE CHANGING CORPORATION, 60-61 (1988).

²⁷¹ Marion G. Crain, *Building Solidarity Through Expansion of NLRA Coverage: A Blueprint for Worker Empowerment*, 74 Minn. L. Rev. 953, 957 May 1990.

Whatever the reason, the decline in union density has meant less power and lower wages for American workers. "When union density was very high, 40 to 50 percent in the private sector, you built a large middle class. People could buy things," said Darrell Chapman, union organizer for Everett's electrician's union, the International Brotherhood of Electrical Workers, local 191. "But with the continual decline of union jobs, the amount of money paid to average Americans has stagnated."²⁷² The bottom line is that the decline in union membership, caused in part by an ineffective NLRA, means that nearly 92 percent of private sector workers are unrepresented and enjoy only minimal job security and exercise no control over their employment destinies.²⁷³

²⁷² Brendan Shriane, *Unions Adapt to a Changing World*, EVERETT BUSINESS JOURNAL, December 1, 2003.

²⁷³ Charles B. Craver, *Why Labor Unions Must (And Can) Survive*, 1 U. Pa. J. Lab. & Emp. L. 15, 17 (1998).

Part V - Ineffectiveness of the NLRA

1. Weak and Untimely Remedies

One of the primary reasons for the decline in unions is increased unlawful employer opposition to organizational efforts, combined with weak and untimely statutory remedies under the NLRA.²⁷⁴ There have been increases in two types of employer violations: discharges of union supporters during organizational campaigns,²⁷⁵ and employers' refusal to bargain in good faith with newly certified unions.²⁷⁶ The NLRB has found Wal-Mart has violated both of these provisions of the NLRA.²⁷⁷

The NLRA has not been significantly amended since the 1940s. It provides outdated protection to union organizers and union members. "Any organizing these days is difficult--extremely difficult," says Mike Sells, secretary/treasurer for the Snohomish County Washington Labor Council.²⁷⁸ "The most difficult thing is companies will disobey the law, they will cut your access." Employers are required to allow union organizers to have reasonable access to employees,²⁷⁹ but union organizers say the NLRB seldom enforces the law.²⁸⁰ Labor unions complain that businesses have used tactics ranging from illegal videotaping of suspected union organizers to outright firings for

²⁷⁴ Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization under the NLRA*, 96 Harv L Rev 1769, 1772-73 (1983).

²⁷⁵ 29 U.S.C. Sec. 158(a)(3).

²⁷⁶ 29 U.S.C. Sec. 158(a)(5); Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization under the NLRA*, 96 Harv L Rev 1769, 1772-74 (1983).

²⁷⁷ Wal-Mart and UFCW, 2003 WL 22532371 (NLRB) November 4, 2003; Wal-Mart and United Paperworkers International, 2003 WL 22184803 (NLRB); Wal-Mart and UFCW, 2002 WL 31323195 (NLRB) September 24, 2003; Sam's Club and Alan T. Peto, an individual and UFCW, 2001 WL 1635459 (NLRB) December 6, 2001 (Unlawfully firing, threatening to fire, disciplining and refusing to promote employees who support the union). See also 2003 WL 21369270 (NLRB Division of Judges), June 10, 2003 (refusing to recognize and bargain with the unit).

²⁷⁸ Brendan Shriane, *Unions Adapt to a Changing World*, EVERETT BUSINESS JOURNAL, December 1, 2003.

²⁷⁹ Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992).

²⁸⁰ Brendan Shriane, *Unions Adapt to a Changing World*, EVERETT BUSINESS JOURNAL, December 1, 2003.

those thought to be organizing. "That's standard operation for many companies in this country," Sells said. "The rules under the NLRA are flouted because the sanctions against flouting the rules are not very great. So they don't care."²⁸¹

A 2000 study by Cornell University found that when companies were faced with organizing drives, half considered closing the factories and moving the work out of the area, effectively killing any organizing drive. After threatening to leave, 62 percent of those companies were able to win NLRB-administered elections to decide if a business could be unionized.²⁸²

Labor leaders say they have been unable to stop the steady decline in union membership because employers are more aggressive and sophisticated about fighting unions. Penalties are weak for breaking laws that are supposed to protect workers' rights to form unions, they say. To form a union, workers must sign authorization cards, and if the union has at least a 30 percent showing of interest, the NLRB is petitioned for an election.²⁸³ A majority of workers must vote for the union by secret ballot. The board will investigate election complaints before certifying a union and ordering bargaining. Stewart Acuff, the AFL-CIO's organizing director, said the process can take years because employers are adept at intimidating workers and stalling. The process is "such a terrible experience for workers. It opens them up to having their rights violated," Acuff

²⁸¹ Brendan Shriane, *Unions Adapt to a Changing World*, EVERETT BUSINESS JOURNAL, December 1, 2003.

²⁸² Brendan Shriane, *Unions Adapt to a Changing World*, EVERETT BUSINESS JOURNAL, December 1, 2003.

²⁸³ NLRA, 29 U.S.C. Sec. 159(c) (1988).

said.²⁸⁴ Studies have shown that the odds are about one in twenty that a union supporter will be fired for exercising rights supposedly guaranteed by federal law."²⁸⁵

2. NLRB Ineffectiveness Illustrated by UFCW and Wal-Mart

The efforts of UFCW to organize Wal-Mart illustrate some of the problems with the NLRA. UFCW has been trying to organize Wal-Mart for years with only minor successes. UFCW says the company has kept labor out with an aggressive anti-union strategy, including videos shown to new employees that portray unions as greedy and dishonest.²⁸⁶ This is one area where the current approach of the corporate Wal-Mart matches the philosophy of its founder, Sam Walton.

I have always believed strongly that we don't need unions at Wal-Mart. Theoretically, I understand the argument that unions try to make, that the associates need someone to represent them and so on. But historically, as unions have developed in this country, they have mostly just been divisive. . . . (A)nytime we have ever had real trouble, or the serious possibility of a union coming into the company, it has been because management has failed, because we have not listened to our associates, or because we have mistreated them. - Sam Walton²⁸⁷

At the first hint of union activity, Wal-Mart managers are supposed to call a hotline, usually prompting a team visit from the home office in Bentonville, Arkansas. Wal-Mart spokeswoman Mona Williams said the intervention was meant to help store managers respond effectively and legally.²⁸⁸ "Our philosophy is that only an unhappy associate would be interested in joining a union," she said, "so that's why Wal-Mart does

²⁸⁴ Leigh Strope, *Workers rally as part of nationwide pro-union day*, ASSOCIATED PRESS, December 11, 2003.

²⁸⁵ Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization under the NLRA*, 96 Harv L Rev 1769, 1772-73 (1983).

²⁸⁶ Abigail Goldman and Nancy Cleeland, *The Wal-Mart Effect*, LOS ANGELES TIMES, November 23, 2003.

²⁸⁷ SAM WALTON & JOHN HUEY, *MADE IN AMERICA, MY STORY*, 129-130 (1992).

²⁸⁸ Abigail Goldman and Nancy Cleeland, *The Wal-Mart Effect*, LOS ANGELES TIMES, November 23, 2003.

everything it can to make sure that we are providing our associates what they want and need."²⁸⁹ Wal-Mart employees who did not want to be identified said the meetings with the Wal-Mart union response teams were mandatory.²⁹⁰ "They said the union is going to come in and take your money and talk for you because they think you can't talk for yourself."²⁹¹ The Supreme Court has held that these types of "captive audience speeches" by employers are lawful as long as the union has reasonable access to make similar communication to employees.²⁹² However, the fact that Wal-Mart goes to this length to make sure its employees do not form union shows that the company's denials of being anti-union may be somewhat disingenuous.

UFCW has had difficulty getting access to Wal-Mart employees. In September 1999, UFCW instituted a "blitz" of Wal-Mart supercenters. In these blitzes, UFCW representatives entered Wal-Mart meat departments in several states and distributed information about its union to Wal-Mart employees.²⁹³ In some instances, the union representatives were asked to leave and they always complied. In September 1999, Wal-Mart filed a lawsuit in an Arkansas county chancery court seeking a temporary restraining order prohibiting UFCW representatives from entering Wal-Mart stores for the purpose of distributing UFCW materials in violation of Wal-Mart's "no solicitation/no distribution" policy.²⁹⁴ Under this policy, Wal-Mart allows solicitation by union

²⁸⁹ Abigail Goldman and Nancy Cleeland, *The Wal-Mart Effect*, LOS ANGELES TIMES, November 23, 2003.

²⁹⁰ Neil Buckley and Caroline Daniel, *Wal-Mart vs. the Workers*, FINANCIAL TIMES, November 20, 2003.

²⁹¹ Adam Fifield, *She was fired from Wal-Mart for insubordination; A foot soldier's march to unionize*, THE PHILADELPHIA INQUIRER, December 26, 2003.

²⁹² *NLRB v. United Steelworkers*, 357 U.S. 357 (1958).

²⁹³ *UFCW v. Wal-Mart*, 120 S.W.3d 89, 91 (Arkansas 2003)

²⁹⁴ *UFCW v. Wal-Mart*, 120 S.W.3d 89, 91 (Arkansas 2003)

organizers in its parking lots but prohibits solicitor's entry into the stores.²⁹⁵ The chancery court entered a temporary restraining order on the basis of the "immediacy of the potential harm" to Wal-Mart and the order was later made permanent and extended to all Wal-Mart stores within any state or territory of the U.S.²⁹⁶ The Arkansas Supreme Court overruled the order in July 2003 stating that there had been an inadequate showing by Wal-Mart of irreparable harm because there was no evidence of customer complaints.²⁹⁷ Nevertheless, Wal-Mart's no solicitation policy is valid and union organizers are usually relegated to conducting their organizational efforts in the parking lot of Wal-Mart's stores.

3. UFCW Wins an Election

UFCW's only minor success with Wal-Mart started with Maurice Miller, a meatcutter at a Wal-Mart in Jacksonville, Texas.²⁹⁸ In 1999, Miller was frustrated with Wal-Mart so he contacted UFCW and signed a union card. To unionize a workplace, 30 percent of workers must sign cards calling for an election held by the NLRB.²⁹⁹ Unions usually will not call an election, though, unless at least half of the workers sign cards in order to increase the chances of winning the election. Miller was able to persuade the rest of the meat cutters at his store to sign cards. In February 2000 the department became the first in the chain to vote to establish a union.³⁰⁰ Eleven days later, later Wal-

²⁹⁵ *UFCW v. Wal-Mart*, 120 S.W.3d 89, 96 (Arkansas 2003). See 2004 WL 1047398 (NLRB Division of Judges), April 26, 2004, upholding Wal-Mart's no solicitation policy. Distribution in work areas may be prohibited. *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962).

²⁹⁶ *UFCW v. Wal-Mart*, 120 S.W.3d 89, 92 (Arkansas 2003)

²⁹⁷ *UFCW v. Wal-Mart*, 120 S.W.3d 89, 94 (Arkansas 2003)

²⁹⁸ Cora Daniels, *Unions vs. Wal-Mart*, FORTUNE, May 3, 2004.

²⁹⁹ Under Section 9(c) of the NLRB, a 30 percent "showing of interest" is required for a representation certification proceeding filed by an employee, a labor organization, or anyone acting on behalf of employees.

³⁰⁰ Cora Daniels, *Unions vs. Wal-Mart*, FORTUNE, May 3, 2004.

Mart disbanded its meat-cutting departments nationwide. It now supplies its stores with prepackaged meat and the meatcutters were split up and assigned elsewhere.³⁰¹

Wal-Mart maintains that the move to packaged meat was in the works before the union drive.³⁰² The NLRB investigated, but did not issue a complaint against Wal-Mart for switching to pre-packaged meat.³⁰³ However, the NLRB did find that Wal-Mart committed an ULP under Section 8(a)(5)³⁰⁴ of the NLRA by refusing to recognize and bargain with the union concerning the change to packaged meat.³⁰⁵ This is a minor victory for UFCW at best. Under Fireboard Paper v. NLRB,³⁰⁶ Wal-Mart will simply be required to bargain over the effects of the decision to close the meatcutting division of its stores. There will be no real remedy here for employees, just discussions regarding transfers, retraining and possible severance packages.

Leonard Page, the NLRB's general counsel at the time, said the timing--and a lack of corporate records showing the move to case-ready meat had been in the works for six months or a year--made Wal-Mart's decision "extremely suspicious."³⁰⁷ Nevertheless, Page concluded that Wal-Mart's decision to go to case-ready meats right after the Jacksonville vote was a coincidence. Page was also investigating Wal-Mart's response to organizing drives around the country.³⁰⁸ In early 2001, he began to pursue a national

³⁰¹ Wal-Mart & UFCW, 2003 WL 21369270 (NLRB Div of Judges), June 10, 2003.

³⁰² Cora Daniels, *Unions vs. Wal-Mart*, FORTUNE, May 3, 2004.

³⁰³ Wal-Mart & UFCW, 2003 WL 21369270 (NLRB Div of Judges), June 10, 2003.

³⁰⁴ 29 U.S.C. Sec. 158(a)(5).

³⁰⁵ Wal-Mart & UFCW, 2003 WL 21369270 (NLRB Div of Judges), June 10, 2003.

³⁰⁶ 379 U.S. 203 (1964).

³⁰⁷ Steven Pearlstein, *Workers' Rights Are Being Rolled Back*, THE WASHINGTON POST, February 25, 2004, page E-1. Pearlstein originally identified the Jacksonville store as being located in Florida, but a later correction identified it correctly as being in Texas.

³⁰⁸ Jennifer Dixon, *Wal-Mart Denies Abusing Workers*, DETROIT FREE PRESS, October 9, 2002.

complaint against the company for what he considered a pattern of illegal responses to organizing drives coming out of Wal-Mart's headquarters in Bentonville, Arkansas.³⁰⁹

Shortly before Page was to meet with Wal-Mart to discuss the complaint, the White House removed Page from his position. Wal-Mart was not mentioned. "That was the biggest thing I had pending on my platter at the time," Page said. Perhaps it's just another coincidence." Page was removed on April 20, 2001, before a replacement had been named.³¹⁰ Page was replaced by John Higgins, who has worked at the NLRB since 1964 on May 17, 2001. For almost a month, the board was unable to issue complaints alleging Unfair Labor Practices without a General Counsel.³¹¹ Page's successor stated there was not enough evidence of a pattern to justify an investigation of Wal-Mart's corporate-wide labor practices.³¹²

4. UFCW Focuses Efforts in Las Vegas

UFCW is continuing its struggle to unionize Wal-Mart. Company policy prohibits any union talk in work areas, and organizers say they are routinely asked to leave stores. UFCW has decided to marshal their resources for a concerted organizing

³⁰⁹ Jennifer Dixon, *Wal-Mart Denies Abusing Workers*, DETROIT FREE PRESS, October 9, 2002.

³¹⁰ Steven Pearlstein, *Workers' Rights Are Being Rolled Back*, THE WASHINGTON POST, February 25, 2004, page E-1; NLRB News Release, "NLRB Member Peter Hurtgen Designated Chairman and Solicitor John Higgins Named Acting General Counsel," May 17, 2001.

³¹¹ The Ticker, *NLRB: Bush Elevates Clinton Appointee to Board Chairman*, CHICAGO TRIBUNE, May 17, 2001. Carlos Tejada, *Work Week*, THE WALL STREET JOURNAL, May 15, 2001; An NLRB employee sent the following e-mail to the WASHINGTON POST: "The White House gave Leonard Page, General Counsel at the NLRB, about 24 hours to vacate office. That was Friday, April 20. No Acting GC has been named, nor has the White House nominated a new GC. Thus, no complaints can issue and we are rudderless." Al Kamen, *U.S. Loses Its Seat; Powell Loses His Cool*, THE WASHINGTON POST, May 7, 2001. NLRB News Release, "NLRB Member Peter Hurtgen Designated Chairman and Solicitor John Higgins Named Acting General Counsel," May 17, 2001; Steven Pearlstein, *Workers' Rights Are Being Rolled Back*, THE WASHINGTON POST, February 25, 2004, page E-1.

³¹² Steven Pearlstein, *Workers' Rights Are Being Rolled Back*, THE WASHINGTON POST, February 25, 2004, page E-1.

effort in one place: Las Vegas.³¹³ The union reached out to workers with a web site and a weekly radio talk show and posted organizers outside Wal-Mart stores at all hours.³¹⁴

Larry Allen was an associate in a Vegas store in 2001 when he was persuaded to sign a union card. "The first day I walked into Wal-Mart with a union button, everything changed," says Allen. "In one day I went from being employee of the month to people not speaking to me."³¹⁵ Allen did his best to unionize the store, but only about 42 percent of workers in the grocery department signed cards--not enough for the union to feel confident about winning an election.³¹⁶

In July 2002 Wal-Mart fired Allen for solicitation; the company says he was handing union literature to a co-worker on the sales floor. Allen denied he did so, but his firing was upheld by the NLRB in April 2004.³¹⁷ The NLRB concluded that UFCW made an initial showing sufficient to support the inference that protected conduct was a motivating factor in the decision to terminate. However, Wal-Mart met its burden of showing the discharge would have occurred even in the absence of union activities.³¹⁸ Meanwhile, Allen has been hired as a UFCW organizer.³¹⁹

The 16 Wal-Marts in Las Vegas are open 24 hours a day, seven days a week. UFCW has 12 full-time union organizers, most of whom are former Wal-Mart employees, waiting in the parking lots to talk to employees about unionizing.³²⁰ The

³¹³ Abigail Goldman and Nancy Cleeland, *The Wal-Mart Effect*, LOS ANGELES TIMES, November 23, 2003; Brendan Shriane, *Unions Adapt to a Changing World*, EVERETT BUSINESS JOURNAL, December 1, 2003.

³¹⁴ Abigail Goldman and Nancy Cleeland, *The Wal-Mart Effect*, LOS ANGELES TIMES, November 23, 2003.

³¹⁵ Cora Daniels, *Unions vs. Wal-Mart*, FORTUNE, May 3, 2004.

³¹⁶ Abigail Goldman and Nancy Cleeland, *The Wal-Mart Effect*, LOS ANGELES TIMES, November 23, 2003.

³¹⁷ *Wal-Mart and UFCW*, 2004 WL 1047398 (NLRB Division of Judges), April 26, 2004.

³¹⁸ *Wal-Mart and UFCW*, 2004 WL 1047398 (NLRB Division of Judges), April 26, 2004.

³¹⁹ Cora Daniels, *Unions vs. Wal-Mart*, FORTUNE, May 3, 2004.

³²⁰ Cora Daniels, *Unions vs. Wal-Mart*, FORTUNE, May 3, 2004.

organizers have resorted in recent months to a more covert approach because they don't want Wal-Mart to know the number of union card signers at any given store.³²¹ They are using the covert tactic out of fear that if Wal-Mart learns that more than 30 percent of workers have signed and therefore a vote is close, they will flood a store with more bodies, a tactic known as "packing the unit." The 30 percent then drops to 20 percent and the organizers have to recruit another 10 percent. Wal-Mart denies engaging in that tactic.³²² However, an ALJ for the NLRB has found Wal-Mart did "pack a unit" in violation of the NLRA by transferring employees into a Tire and Lube Express work center that was close to generating enough support for the union to call for an election at a Wal-Mart store in New Castle, Pennsylvania.³²³

5. Wal-Mart Commits Unfair Labor Practices

A review of other NLRB cases involving Wal-Mart and UFCW shows that dozens of times in the last four years, attorneys for the NLRB have claimed that the company infringed on UFCW's legal right to organize. Although some of those claims have been thrown out, others have been upheld by ALJs, who have ruled that Wal-Mart illegally influenced employees with offers of raises, promotions and improved working conditions just before they were to vote on whether to join a union. Judges also have found that Wal-Mart illegally implied that workers could lose benefits such as insurance and profit sharing if they unionized.³²⁴ Specifically, Wal-Mart has been found to have committed many ULPs, such as:

³²¹ Cora Daniels, *Unions vs. Wal-Mart*, FORTUNE, May 3, 2004.

³²² Cora Daniels, *Unions vs. Wal-Mart*, FORTUNE, May 3, 2004.

³²³ Wal-Mart and UFCW, 2003 WL 22703237, November 12, 2003, holding Wal-Mart committed a Sec 8(a)(1) ULP by transferring employees into the workcenter to dilute support for the union.

³²⁴ Abigail Goldman and Nancy Cleeland, *The Wal-Mart Effect*, LOS ANGELES TIMES, November 23, 2003.

- Unlawfully firing, threatening to fire, disciplining and refusing to promote employees who support the union;³²⁵
- Unlawfully prohibiting union handbilling outside stores;³²⁶
- Promising to remedy employee concerns or increase wages in an effort to remove union support;³²⁷
- Engaging in surveillance of union activities of employees;³²⁸
- Coercively interrogating an employee concerning the union sympathies and support of other employees;³²⁹
- Transferring employees to dilute support for the union;³³⁰
- Removing off-duty employee from property because he wore a T-shirt with a union message;³³¹
- Confiscating union material, prohibiting the wearing of union pins, and polling employees;³³²
- Disparaging employees union activities or inviting them to quit because they support the union;³³³
- Threatening employees with the loss of benefits because they engage in union activities;³³⁴
- Publishing an associates benefits book which said: "Contractually excluded and certain other union represented associates are not eligible for coverage," as a threat to continue benefits if employees voted for a union.³³⁵

³²⁵ Wal-Mart and UFCW, 2003 WL 22532371 (NLRB) November 4, 2003; Wal-Mart and United Paperworkers International, 2003 WL 22184803 (NLRB); Wal-Mart and UFCW, 2002 WL 31323195 (NLRB) September 24, 2003; Sam's Club and Alan T. Peto, an individual and UFCW, 2001 WL 1635459 (NLRB) December 6, 2001.

³²⁶ Wal-Mart and UFCW, 2003 WL22855568 (NLRB) November 28, 2003; Wal-Mart and UFCW, 2001 WL 1589768 (NLRB) October 3, 2001.

³²⁷ Wal-Mart and UFCW, 2003 WL22703237 (NLRB) November 12, 2003; Wal-Mart and UFCW, 2003 WL 22123266, (NLRB) September 10, 2003.

³²⁸ Wal-Mart and UFCW, 2003 WL22703237 (NLRB) November 12, 2003.

³²⁹ Wal-Mart and UFCW, 2003 WL22703237 (NLRB) November 12, 2003; Wal-Mart and UFCW, 2002 WL 31323195 (NLRB) September 24, 2003.

³³⁰ Wal-Mart and UFCW, 2003 WL22703237 (NLRB) November 12, 2003.

³³¹ Wal-Mart and UFCW, 2003 WL 22273588 (NLRB) September 30, 2003.

³³² In re Sam's Club, 2002 WL 31746557 (NLRB Div. Of Judges) November 29, 2002; Wal-Mart and UFCW, 2002 WL 31323195 (NLRB) September 24, 2003.

³³³ Wal-Mart and UFCW, 2002 WL 31323195 (NLRB) September 24, 2003.

³³⁴ Wal-Mart and UFCW, 2002 WL 31323195 (NLRB) September 24, 2003; Wal-Mart and UFCW, 2002 WL 1835448 (NLRB) August 6, 2002.

³³⁵ Wal-Mart Stores, Inc., 2003 NLRB Lexis 86, 166-171 (February 28, 2003).

The ineffectiveness of the NLRA is seen in the remedies ordered by the NLRB in many of these cases. For example, in Wal-Mart and UFCW,³³⁶ managers at a Noblesville, Indiana store in August 2000 exceeded Wal-Mart's official no solicitation rule and told union organizers they could not engage in union activities in Wal-Mart's parking lot. When union organizers resisted, the managers called local police and had the organizers threatened with arrest for trespassing. The NLRB found this to be a violation of Section 8(a)(1) of the NLRA.³³⁷ The NLRB opinion was issued in November 2003, three years and three months after the incident occurred and the remedy was simply that Wal-Mart was ordered to cease and desist and to post a notice stating the company had violated the NLRA. This remedy is completely ineffective in helping UFCW overcome the ULP and be put in the same place as if the store managers had followed the law. The remedy is also insufficient to discourage Wal-Mart managers from behaving in a similar manner in the future.

The NLRA's ineffectiveness is also seen in Wal-Mart and UFCW,³³⁸ where UFCW was trying to organize the employees of a Wal-Mart Tire and Lube Express at a store in Pennsylvania in June 2000. The NLRB Administrative Law Judge found that Wal-Mart violated Sections 8(a)(1) and 8(a)(3) of the NLRA by promising to remedy employee concerns, installing new equipment and removing a district manager in an effort to undermine union support, by coercively interrogating an employee concerning union sympathies and by transferring employees into and out of the TLE to dilute support for

³³⁶ 2003 WL 22855568 (NLRB), November 28, 2003.

³³⁷ 29 U.S.C. Sec. 158(a)(1).

³³⁸ 2003 WL 22703237 (NLRB Division of Judges), November 12, 2003.

the union. The remedy, ordered more than three years after the violation, was again, simply an order that Wal-Mart cease and desist and post a notice. Again, this remedy is ineffective in facilitating UFCW's efforts to unionize this TLE. Wal-Mart blatantly violated the NLRA and got what it wanted--continued non-union employees, without facing any real penalty.

In Wal-Mart and UFCW,³³⁹ Edward Eagen was fired in May 2000 after signing a union card and encouraging other employees to join the union. Three years and six months later, an NLRB ALJ determined Wal-Mart violated section 8(a)(1) and 8(a)(3) by the firing:

"It is apparent that upon learning that there was union activity in the store, Respondent mobilized its regional and corporate personnel to combat the union's organization efforts. . . . Thus, while Respondent responded to what appeared to be an ongoing campaign, Eagen was the only known union supporter and he was terminated less than six weeks after he made his support known."³⁴⁰

Wal-Mart was ordered to cease and desist from disciplining employees based upon their union activities, to post a notice, and to reinstate Eagen with pay back pay, minus any wages Eagen had earned during the three years it took the case to be processed through the NLRB. This remedy is totally ineffective in deterring Wal-Mart's behavior. It is most likely that Eagen has gone on to another job and would not accept reinstatement. His back pay award was most likely minimal. It is a long standing rule that when the NLRB calculates back pay, a deduction should be made, not only for actual interim earnings by the worker, but also for amounts the worker failed without excuse to earn.³⁴¹

³³⁹ 2003 WL 22532371 (NLRB Division of Judges), November 4, 2003.

³⁴⁰ 2003 WL 22532371 (NLRB Division of Judges), November 4, 2003.

³⁴¹ Phelps Dodge Corp v. NLRB, 313 U.S. 177 (1941); See CHARLES J. MORRIS, THE DEVELOPING LABOR LAW, 1634 n 6 (BNA, 2d ed 1983).

After deducting whatever Eagen earned in the interim and assuming he was paid \$8 an hour like most associates, the remedy would be negligible to both Eagen and Wal-Mart.

Many employees find themselves in situations similar to Eagen. According to a survey of 400 NLRB election campaigns in 1998 and 1999, employers illegally fire employees for union activity in at least 25 percent of all organizing efforts.³⁴² 79 percent of poled workers agreed that workers are "very" or "somewhat" likely to be fired for trying to organize a union.³⁴³

6. It Pays to Violate the NLRA

Clearly, Wal-Mart's anti-union tactics are effective--the retailer has lost only one election--the meatcutters in Jacksonville, Texas. Even that election did not result in any part of its workforce being unionized. During the protracted period in which the ULP against the employer is being processed, employee support for the union, as well as the union's ability to organize is likely to disappear.³⁴⁴ Given the effectiveness of its anti-union conduct, and the ineffectiveness of the NLRA's remedies at deterring Wal-Mart from committing ULPs, it seems clear that it pays for Wal-Mart to violate the NLRA.

A simple cost-benefit analysis done by an employer will show that it pays to violate the NLRA. The cost of the violation--the existing NLRA remedies--is negligible, when discounted by the probability of detection. The benefits of the violation--a non-union workforce--are significant. The firing of union supporters discourage pro-union support by signaling to other employees that their support for a union may cost them their

³⁴² Kate Bronfenbrenner, *Uneasy Terrain: The Impact of Capital Mobility on Workers, Wages and Union Organizing*, U.S. TRADE DEFICIT REVIEW COMMISSION (2000).

³⁴³ Brent Garren, *When the Solution Is The Problem: NLRB Remedies and Organizing Drives*, 51 Labor L. J. 76, 78 (2000).

³⁴⁴ Robert J. LaLonde, Bernard D. Meltzer, *Hard Times for Unions: Another Look at The Significance of Employer Illegalities*, 58 U. Chi. L. Rev. 953, 965 (1991).

jobs. If discriminatory discharges avert or substantially delay union organization, the cost to the firm from a NLRB remedy may be less than the increased labor costs and the loss of managerial autonomy that are likely to result from a union victory.³⁴⁵ In response to this problem, some members of Congress support amendments of the NLRA.

7. The Employee Free Choice Act

U.S. Rep. George Miller, D-Calif., and Sen. Edward Kennedy, D-Mass., have introduced new legislation that would impose strict sanctions on employers who skirt labor law when employees are involved in union drives. The Employee Free Choice Act (EFCA) was introduced in the Senate³⁴⁶ and in the House³⁴⁷ on November 21, 2003. The lawmakers specifically cited Wal-Mart when they introduced the bills.

Unfortunately, the law that Congress enacted in 1935 no longer works to protect the right of workers to form and join unions. Recent history is littered with the stories of companies that defeated their workers when they sought to exercise their legal rights to organize for mutual benefit.³⁴⁸ . . . We are all aware of the egregious record of Wal-Mart, whose vigorous anti-union activities include threats and firings to unlawful surveillance. In the last few years, Wal-Mart has been charged with well over 100 unfair labor practices and has faced at least 50 formal complaints from the NLRB. None of this has apparently deterred Wal-Mart. Current law simply does not discourage lawbreakers.³⁴⁹

The EFCA primarily does three things: First, it streamlines union certification by providing for certification of a union based upon signatures on authorization forms instead of requiring elections; Second, the act facilitates the formation of initial

³⁴⁵ Robert J. LaLonde, *Bernard D. Meltzer, Hard Times for Unions: Another Look at The Significance of Employer Illegalities*, 58 U. Chi. L. Rev. 953, 964 (1991).

³⁴⁶ 2003 Cong U.S. S 1925

³⁴⁷ 2003 Cong U.S. HR 3619

³⁴⁸ Statement by the Honorable George Miller (D-Ca) On Introducing the Employee Free Choice Act, Thursday, 13 November 2003; <http://edworkforce.house.gov/democrats/releases/rel111303.html>.

³⁴⁹ Statement by the Honorable George Miller (D-Ca) On Introducing the Employee Free Choice Act, Thursday, 13 November 2003; <http://edworkforce.house.gov/democrats/releases/rel111303.html>; Brendan Shriane, *Unions Adapt to a Changing World*, EVERETT BUSINESS JOURNAL, December 1, 2003.

Collective Bargaining Agreements by setting firm deadlines for the process; and Third, it increases the penalties for violation of the NLRA to include tripling of back pay and fines of up to \$20,000 for willful violations. This part of the EFCA also gives employees equal access to "mandatory" injunctive relief against employers. Under Section 10(j) of the existing NLRA,³⁵⁰ the NLRB may seek injunctive relief for ULPs committed by employers. Section 10(l),³⁵¹ however, *mandates* that the NLRB seek injunctive relief when a union commits a ULP. The EFCA proposes equal treatment for injunctive relief and mandates that the NLRB seek injunctive relief, no matter who committed the ULP.

It has been many months since the EFCA was introduced in Congress where the bill was assigned to the House Employer-Employee Relations Subcommittee³⁵² and the Senate Committee on Health, Education, Labor and Pensions.³⁵³

Witnesses before the House Employer-Employee Relations Subcommittee took testimony about trends and tactics in labor organizing campaigns on April 22, 2004. Of the three witnesses to testify, only one spoke in support of the EFCA--Nancy Schiffer, the Associate General Counsel of AFL-CIO. Schiffer stated that the EFCA had support from 30 senators and 180 representatives and that the EFCA was needed because NLRB elections are conducted in an inherently coercive environment, the workplace.³⁵⁴ Schiffer stated that the number of instances of illegal discipline or discharge of workers for union activity documented by the NLRB skyrocketed from 1,000 per year in the early 1950s to 15,000-25,000 annually in recent years. Schiffer also reported that the average back pay

³⁵⁰ 29 U.S.C. Sec. 160(j)

³⁵¹ 29 U.S.C. Sec. 160(l)

³⁵² Government Press Release, 2004 WL 62027102, April 22, 2004.

³⁵³ 2003 U.S. S. 1925.

³⁵⁴ 2004 WL 2011711, Congressional Testimony by Federal Document Clearing House, LABOR ORGANIZING CAMPAIGNS - Nancy Schiffer.

award for an employer who was found to have illegally discharged a worker in violation of the NLRA was only \$3,000.³⁵⁵

The two other witnesses to testify on April 22, 2004,³⁵⁶ did not address the EFCA directly, but instead focused on the importance of union elections and warned legislators against passing any law that allows unions to form based solely on authorization card majority.³⁵⁷ The testimony of one of these witnesses included citations of federal court decisions which indicated a preference for elections instead of card checks. For example:

It would be difficult to imagine a more unreliable method of ascertaining the real wishes of employees than a 'card check,' unless it were an employer's request for an open show of hands. The one is no more reliable than the other.³⁵⁸

Given the lack of movement of the EFCA in the months since it was introduced and the radical change it proposes to the established union secret ballot election system, it seems unlikely it will ever become law in its current form. The drafters and supporters would have more success if they abandoned the first goal of the EFCA. It is unlikely to expect Congress to ever drop the NLRA's long-standing requirement of secret ballot elections given our country's reliance on the democratic process. There is simply too much history supporting elections and too much concern about the possibility of union pressure to get a majority of signatures on authorization cards even though workers do not truly want a union.

³⁵⁵ 2004 WL 2011711, Congressional Testimony by Federal Document Clearing House, LABOR ORGANIZING CAMPAIGNS - Nancy Schiffer.

³⁵⁶ Clyde H. Jacob III, Esq. Partner (Labor & Employment) Jones Walker, New Orleans, La., and Charles I. Cohen, Senior Partner Morgan, Lewis & Bockius LLP, a former member of the NLRB.

³⁵⁷ 2004 WL 2011710, Congressional Testimony by Federal Document Clearing House, April 22, 2004, Charles I. Cohen; 2004 WL 2011712, Congressional Testimony by Federal Document Clearing House, April 22, 2004, Clyde H. Jacob III.

³⁵⁸ NLRB v. S.S. Logan Packing Co., 386 F.2d 562, 565 (4th Cir. 1967).

A better approach would be for the EFCA to make as a primary goal improving the remedies for violating the NLRA. That type of proposed legislation is much more likely to pass. The NLRB and courts have recognized for decades that the NLRA provides inadequate relief. The Board stated in 1970 in Ex-Cell-O Corporation³⁵⁹ where the ALJ had ordered an employer to provide make-whole relief to employees who suffered from employer's ULPs: "Much as we appreciate the need for more adequate remedies . . . we believe that, as the law now stands, the proposed remedy is a matter for Congress, not the Board."³⁶⁰ This is Congress' opportunity, 34 years after Ex-Cell-O Corporation, to provide better remedies for employees who suffer ULPs at the hands of their employers.

Improving the penalties for ULPs is the single-most needed change to the NLRA. Imposing real penalties on employers who violate the NLRA will help to equalize the playing field for those attempting to organize unions. Congress needs to make it clear to employers that it does not pay to violate the NLRA. The drafters of the EFCA have the right idea in improving the NLRA's remedies. However, these proposed changes are unlikely to become law since the EFCA drafters are also seeking an abandonment of the secret ballot election process within the same legislation. It would be more effective to propose legislation which simply proposes improvement of the NLRA remedies. Such legislation is more likely to become law. Pro-employer politicians can easily argue against abandoning the secret ballot election process. However, it would be difficult for these same politicians to argue against increasing the penalties for violating a law that was established decades ago.

³⁵⁹ 185 N.L.R.B. 107 (1970)

³⁶⁰ Ex-Cell-O Corporation, 185 N.L.R.B. 107 (1970)

Part VI - Why Wal-Mart Must be Unionized

1. A Matter of Survival

Union officials recognize the necessity of unionizing the giant retailer. "If we want to survive," says Stewart Acuff, organizing director of the AFL-CIO, "labor has no choice but to organize Wal-Mart."³⁶¹ Without the EFCA, unions are going to have to continue working on the uneven playing field provided by the NLRA. Given the expanding nature of the service industry and the loss of the good jobs provided by employers in the manufacturing industry, unionization of service industry employers is necessary to make the service jobs better. It all should start at Wal-Mart.

2. Unionization of Wal-Mart Would Benefit All Service Employees

Unionizing Wal-Mart would effect more than just its 1.2 million employees. It would have the potential of improving working conditions for all service sector employees in the U.S. In the past, non-union workers have received indirect financial gain from the labor movement, as their employers have provided them with wage and benefit packages competitive with those enjoyed by unionized employees.³⁶² This is very significant given the continuing shift in America's economy from a manufacturing to a service industry base. The manufacturing jobs that have been lost in recent decades are being replaced with service industry jobs, many of which pay less. However, the unionization of Wal-Mart could help bring the type of good wages, pensions and other stability to these service industry jobs that American manufacturing workers enjoyed in the past. Unionizing Wal-Mart has the potential to improve working conditions for all

³⁶¹ Cora Daniels, *Unions vs. Wal-Mart*, FORTUNE, May 3, 2004.

³⁶² RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? 151-153 (1984).

service employees in America since non-union employers will be required to provide wages and benefits comparable to those received by the unionized workers.

3. Other Solutions to Wal-Mart Problem Will Not Be Effective

a. Traditional litigation - Traditional lawsuits against Wal-Mart are not going to be effective to change the corporation's behavior towards its employees. Traditional litigation is simply too slow to be an effective mechanism and the end result is to force the company to pay monetary damages only if it violates the law. Litigation cannot require Wal-Mart to pay higher wages or to provide better benefits.

The largest lawsuit facing Wal-Mart is the gender discrimination class action in Federal court in California which could eventually include up to 2.5 million plaintiffs. This lawsuit was filed in June 2001--nearly three years ago and was certified as a class action on June 22, 2004. Wal-Mart has indicated it will appeal that ruling.³⁶³ Traditional litigation takes too long to effectively change Wal-Mart's behavior. Unionization would likely generate a Collective Bargaining Agreement with grievance-arbitration procedures which would resolve disputes more quickly.

Traditional litigation, even once completed, may be ineffective at changing corporate behavior towards employees. Again looking at the Wal-Mart class action lawsuit, the case could potentially settle for an amount in excess of \$100 million based upon comparisons with a similar action brought against Home Depot and other large employers. However, despite requiring large corporate employers to pay out large sums of money, class actions may not be effective mechanisms to protect workers. Professor Michael Selmi wrote that these class action lawsuits, and the large settlements they

³⁶³ Amy Joyce, *Wal-Mart Bias Case Moves Forward*, THE WASHINGTON POST, June 23, 2004, page A1.

generate, produce little to no substantive change within the corporations and instead produce only changes which are cosmetic in nature designed to address public relations problems.³⁶⁴

One could argue that the litigation itself, combined with the company's fear of negative public relations because of the suit, could bring about changes in the employment relationship. For example, in the Wal-Mart discrimination lawsuit, one of the plaintiffs main complaints about Wal-Mart's promotion practices is that openings in the company's entry-level management program were not posted. Employees interested in management positions did not know when or how to apply and instead male managers would "tap on the shoulder" male subordinates for the unposted jobs, leaving women out of the loop.³⁶⁵ The plaintiffs describe this management training program as the gateway from low-paying hourly jobs to the higher-paying management positions.³⁶⁶

The company began posting entry-level management positions for the first time in January 2003. Wal-Mart claims its focus on growth had precluded it from requiring such postings before then. Although this seems like a positive development for women interested in promotions at Wal-Mart, attorneys for the plaintiffs state the posting was in reality designed to deter women from applying.

The posting . . . is unlike any other posting I've ever seen, it says, 'Here is the management training job and it's terrible.' It says, 'The management trainees work 48 hours a week. They have a varied schedule to include all shifts. Scheduled days off are typically not consecutive. They go to Assistant Managers, all these bad things about this job. There is nothing good about this job. Now, why would they say that? You have to compare that to their interrogatory answers. . . . We asked them, 'What factors do you believe discourage women from going into management?' They gave a list: daily

³⁶⁴ Michael Selmi, *The Price of Discrimination: the Nature of Class Action Employment Discrimination Litigation and its Effects*, 81 Tex. L. Rev. 1249, 1250 April, 2003.

³⁶⁵ Plaintiff's Class Action Brief, April 28, 2003.

³⁶⁶ Plaintiff's Class Action Brief, April 28, 2003.

schedule, days of work, irregular scheduling, longer hours. You couldn't have designed a job posting that more carefully tracks what they believe will discourage women than this.³⁶⁷

The bottom line is that even if traditional litigation generates minor effects to improve employment conditions, it can only require Wal-Mart to follow the law. It can theoretically stop Wal-Mart from discriminating, from requiring its employees to work overtime without pay, and stop the retailer from using illegal immigrants to clean its stores. However, traditional litigation cannot increase wages, require Wal-Mart to make health insurance more accessible to its employees, or prohibit Wal-Mart from purchasing large quantities of merchandise from China. Traditional litigation can only require Wal-Mart to pay penalties if it does not follow the law--it cannot do anything to help decrease the effects of the power imbalance between Wal-Mart and its employees.

b. Consumers Voting with Dollars

One possible way to get Wal-Mart to become a better employer is for consumers to shop elsewhere until Wal-Mart improves its employment practices. Even though Wal-Mart is concerned about its public image, this pressure from consumers is unlikely to be forthcoming. Wal-Mart has received a great deal of media attention regarding its employment practices and has responded with efforts to show the public how well it treats its employees. Specifically, Wal-Mart has altered its advertising campaign to showcase women managers and other employees who have benefited from working at the retail giant.³⁶⁸ It is unlikely that consumers will stop shopping at Wal-Mart anytime soon for the simple reason that Americans love a bargain. "We have split brains," said Robert

³⁶⁷ Oral argument regarding class certification, September 24, 2003, page 210, lines 23-25.

³⁶⁸ Greg Schneider, *Longtime Price Message Takes a Back Seat to Blitz Designed to Mend Reputation*, THE WASHINGTON POST, January 24, 2004, page E-1.

Reich, U.S. secretary of Labor under President Clinton and now a professor of economic and social policy at Brandies University. "Most of the time, the half of our brain that wants the best deal prevails." The connection may be lost on many, Reich said, but consumers' addiction to low prices is accelerating the shift toward a two-tiered U.S. economy, with a shrinking middle class and a growing pool of low-wage workers. "Wal-Mart's prices may be lower," he said, "but that's small consolation to a lot of people who end up with less money to spend."³⁶⁹

A 2004 report from the Food Marketing Institute found that the proportion of respondents who said a supermarket was their primary food store fell by 5 percentage points since a year earlier to 72 percent.³⁷⁰ The share of shoppers who considered a discount store, like Wal-Mart, their first choice rose by 4 percentage points, to 21 percent. However, after inflation, the savings were only nominal over the previous year. The average weekly bill fell from \$91 to \$90 as compared to January 2003. Working against the desire to save money was the desire to save time. The survey showed an increase in purchases of precooked foods, which cost more than the ingredients for from-scratch meals.³⁷¹

Although consumers may save a few pennies by shopping at Wal-Mart, in the long run, they may be costing themselves and other Americans more in the future. It is possible consumers will consider the Spanish saying: *lo barato sale caro*, which translates to 'what's cheap ends up expensive.'³⁷²

³⁶⁹ Abigail Goldman and Nancy Cleeland, *The Wal-Mart Effect*, LOS ANGELES TIMES, November 23, 2003.

³⁷⁰ Ira Dreyfuss, *Consumers Deserting Supermarkets for Discount Stores*, ASSOCIATED PRESS, May 2, 2004, available at <http://aolsvc.news.aol.com/business/article.adp?id=20040502122809990001>.

³⁷¹ Ira Dreyfuss, *Consumers Deserting Supermarkets for Discount Stores*, ASSOCIATED PRESS, May 2, 2004, available at <http://aolsvc.news.aol.com/business/article.adp?id=20040502122809990001>.

³⁷² Cindy Rodriguez, *Wal-Mart's bargains may prove costly*, DENVER POST, December 15, 2003.

4. Costco Shows a Unionized Retailer Can Succeed

Looking at another retailer, Costco, a direct competitor of Wal-Mart's Sam's Club warehouses, illustrates that a unionized retailer can succeed. Costco has 100,000 employees, 432 stores nationwide and has amicable relations with its Teamsters-represented employees.³⁷³ Costco has won a reputation for having the best benefits in retail. Its employees are paid about \$5 an hour more than those at Wal-Mart and Costco also has about twice as many workers covered by company health care.³⁷⁴ 82 percent of Costco's employees are covered by company health insurance.³⁷⁵ Costco pays starting employees at least \$10 an hour, and with regular raises a full-time hourly worker can make \$40,000 annually within 3 1/2 years.³⁷⁶ Costco also pays 92 percent of its employees health insurance premiums, unlike the 66 percent Wal-Mart pays. Costco's health plan offers a broader range of care than Wal-Mart's does, and part-time Costco workers qualify for coverage in six months, compared with the two year waiting period for Wal-Mart part-time workers.³⁷⁷ Costco says its higher pay and better benefits boost loyalty: Its employee turnover rate is 24 percent a year. Wal-Mart's overall employee turnover rate is 50 percent.³⁷⁸ Higher turnover rates leads to higher training costs for the employer. Costco has reduced these costs and others by slowing new store openings.³⁷⁹

³⁷³ Ann Zimmerman, *Costco's Dilemma: Be Kind to its workers or Wall Street*, THE WALL STREET JOURNAL, March 26, 2004.

³⁷⁴ James O. Goldsborough, *Yet another challenge to Wal-Mart*, SAN DIEGO UNION-TELEGRAPH, April 12, 2004.

³⁷⁵ Ann Zimmerman, *Costco's Dilemma: Be Kind to its workers or Wall Street*, THE WALL STREET JOURNAL, March 26, 2004.

³⁷⁶ Ann Zimmerman, *Costco's Dilemma: Be Kind to its workers or Wall Street*, THE WALL STREET JOURNAL, March 26, 2004.

³⁷⁷ Ann Zimmerman, *Costco's Dilemma: Be Kind to its workers or Wall Street*, THE WALL STREET JOURNAL, March 26, 2004.

³⁷⁸ Ann Zimmerman, *Costco's Dilemma: Be Kind to its workers or Wall Street*, THE WALL STREET JOURNAL, March 26, 2004.

³⁷⁹ Ann Zimmerman, *Costco's Dilemma: Be Kind to its workers or Wall Street*, THE WALL STREET JOURNAL, March 26, 2004.

Despite seeing a rise in 2004 fiscal first-quarter profit of 9.9 percent, Costco draws criticism from Wall-Street analysts for sharing its success with its employees, and not "caring for its shareholders first."³⁸⁰ Costco stock traded at on 20 times projected per-share earnings for 2004 compared with about 24 for Wal-Mart stock.³⁸¹ However, Costco President and CEO, Jim Sinegal states: "I happen to believe that in order to reward the shareholder in the long term, you have to please your customers and workers."³⁸²

The reality is that Wal-Mart is so far ahead of all of its competitors that unionization would not cause that big of an impact on the corporation. The unionization of Wal-Mart should lead to unionization of the competition. Once workers at Target, Sears and J.C. Penney see that the Wal-Mart employees who unionized get a higher wage and better benefits, they are likely to unionize as well. The overall result will be an improvement of all jobs in the rapidly growing service industry. These are jobs that cannot be shipped overseas to cheaper labor. Americans will always need a place to go to buy hardware and groceries. Cashiers, employees who stock shelves, and employees who deliver goods to the stores are not jobs that can be sent to China or India.

³⁸⁰ James O. Goldsborough, *Yet another challenge to Wal-Mart*, SAN DIEGO UNION-TELEGRAPH, April 12, 2004.

³⁸¹ Ann Zimmerman, *Costco's Dilemma: Be Kind to its workers or Wall Street*, THE WALL STREET JOURNAL, March 26, 2004.

³⁸² James O. Goldsborough, *Yet another challenge to Wal-Mart*, SAN DIEGO UNION-TELEGRAPH, April 12, 2004.

Part VII - How UFCW Can Unionize Wal-Mart

The benefits of unionization for Wal-Mart's employees are clear: better wages, better benefits, and a collective voice to protect workers' rights and ensure Wal-Mart behaves better towards its employees. However, as the struggles UFCW has engaged in with Wal-Mart show, it is not going to be an easy task to unionize the giant retailer. Help from Congress with the EFCA seems unlikely to become law. Therefore, UFCW is going to have to operate on the existing uneven playing field. Here are some practical suggestions UFCW should consider in their endeavor to unionize Wal-Mart.

1. Get Bigger and Stronger. To organize the world's largest company, union organizers are going to need more financial strength. The California Grocery strike weakened UFCW. The union lost revenues when 70,000 of its workers were not collecting pay checks and were not paying union dues. The union reportedly paid more than \$1 million per week each week of the California Grocery Strike in the form of strike benefits for unionized workers walking the picket line.³⁸³ The strike started on October 11, 2003, and ended on February 27, 2004--just over 20 weeks. The California Grocery strike could have cost UFCW more than \$20 million in strike benefits. At the same time, the union was not receiving regular dues from the 70,000 workers who were not collecting paychecks. The union is now strapped for cash.³⁸⁴ UFCW needs to take action to gain more members and more monetary strength. It takes money to run organizing campaigns and hire union organizers.

The best way for UFCW to grow is to merge with other unions. This has happened at other unions who have learned from the California grocery strike. Two of

³⁸³ Nancy Cleeland, *Grocers Rejection Union Offer*, LOS ANGELES TIMES, December 20, 2003.

³⁸⁴ Cora Daniels, *Unions vs. Wal-Mart*, FORTUNE, May 3, 2004.

the nation's most aggressive labor unions recently combined to better contend with national companies that are growing bigger themselves through mergers. The leaders of the Union of Needletrades, Industrial and Textile Employees (UNITE) and the Hotel Employees and Restaurant Employees union (HERE) said the California grocery strike underscored why they needed to take a page from corporate giants and merge. "You need to have strong unions that are capable of fighting . . . the coming battles between workers and employers wanting to lower their living standards," said UNITE's president, Bruce Raynor.³⁸⁵

HERE is one of the few unions that has seen membership gains. HERE had about 255,000 members nationally as of last year, an increase of about 15,000 from five years earlier. UNITE has seen its membership fall sharply from 285,000 in 1998 to 218,000 in 2003, as more jobs in apparel and textile manufacturing have fled to other countries.³⁸⁶ A merger with the HERE and UNITE unions would not only increase the UFCW membership by more than 500,000 members, but could also increase the union's monetary power. UNITE is a financially strong union, in large part because of its long history and holdings, which include the Amalgamated Bank in New York. The union had net assets of almost \$9 million at the end of 2002. HERE's net assets stood at about \$20 million.³⁸⁷

The Service Employees International Union (SEIU), the Laborers' International Union of North America, and the United Brotherhood of Carpenters have also joined this

³⁸⁵ Don Lee, *Unions Plan to Merge to Counter Corporate Giants*, LOS ANGELES TIMES, February 27, 2004.

³⁸⁶ Don Lee, *Unions Plan to Merge to Counter Corporate Giants*, LOS ANGELES TIMES, February 27, 2004.

³⁸⁷ Don Lee, *Unions Plan to Merge to Counter Corporate Giants*, LOS ANGELES TIMES, February 27, 2004.

group of unions, which is now labeled the New Unity Partnership.³⁸⁸ UFCW should join this partnership and seek organizing assistance from AFL-CIO. The battle to organize Wal-Mart is significant enough to affect all unions. These unions all have similar interests in unionizing Wal-Mart since it could leave to improved wages, benefits and working conditions for all service industry workers. Andrew L. Stern, president of SEIU, part of the New Unity Partnership, has called for setting aside \$1 million of SEIU money to finance an effort to organize Wal-Mart. Union strategists are also exploring the possibility of funneling \$10 to \$30 million a year through the AFL-CIO to finance an unprecedented multi-union drive to organize workers at Wal-Mart.³⁸⁹ Unions are going to have to change their strategies and become bigger and stronger to take on the nation's unorganized giant corporations.

2. Change Public Perception of Unions - UFCW must create a favorable public perception of unionization. There is a popular perception that many labor leaders are corrupt, that bargaining agreements create inefficient work rules inhibiting worker productivity, and that organized employees' compensation levels exceed the value of their services. Labor leaders must work actively to counteract these negative public views. Unions should focus not solely on the economic gains achieved through the bargaining process, but also on the collective voice which enables workers to influence their employment destinies.³⁹⁰

³⁸⁸ Thomas B. Edsall, *Union Leader Urges AFL-CIO Reform*, THE WASHINGTON POST, June 22, 2004, page A2.

³⁸⁹ Thomas B. Edsall, *Union Leader Urges AFL-CIO Reform*, THE WASHINGTON POST, June 22, 2004, page A2.

³⁹⁰ Charles B. Craver, *Why Labor Unions Must (And Can) Survive*, 1 U. Pa. J. Lab. & Emp. L. 15, 17 (1998).

Labor leaders are getting a great deal of press as they battle Wal-Mart in Las Vegas and elsewhere in the nation and are promoting the fact that union employees earn more and receive better benefits packages. This media attention provides a real opportunity for union organizers to also talk about enhanced working conditions enjoyed by unionized personnel. Organizers should also emphasize "just cause" provisions in CBA as opposed to America's general rule of Employment-at-will.³⁹¹

3. Hire the Right Organizers - UFCW must also continue to use trained organizers who are former Wal-Mart employees who understand Wal-Mart's policies and unique language. It is generally beneficial for the organizers or their families to have worked in the industries involved.³⁹² Stan Fortune, a one-time police officer, had a 14-year career at Wal-Mart where he was promoted to the number two job in a supercenter. Fortune was fired from his co-manager's job in 2001 after he confronted a shoplifter in the parking lot. Wal-Mart says he violated company rules by engaging in the scuffle. Fortune is now a professional organizer for the UFCW, trying to recruit Sam's Club workers in Las Vegas.³⁹³ In 2001 UFCW took the unusual step of relying almost exclusively on former Wal-Mart workers, even former Wal-Mart managers, to lead the campaign.³⁹⁴ The union literature, updated since the arrival of the former Wal-Mart workers, quotes Sam Walton and pleads with associates to unionize to bring their store up to the standards that "Mr. Sam" would have wanted.³⁹⁵

³⁹¹ Charles B. Craver, *Why Labor Unions Must (And Can) Survive*, 1 U. Pa. J. Lab. & Emp. L. 15, 17 (1998).

³⁹² Charles B. Craver, *Why Labor Unions Must (And Can) Survive*, 1 U. Pa. J. Lab. & Emp. L. 15, 17 (1998).

³⁹³ Mark Gimein, *Wal-Mart--Sam Walton Made Us a Promise*, FORTUNE MAGAZINE, March 18, 2002.

³⁹⁴ Cora Daniels, *Unions vs. Wal-Mart*, FORTUNE, May 3, 2004.

³⁹⁵ Cora Daniels, *Unions vs. Wal-Mart*, FORTUNE, May 3, 2004.

4. Fight in California - More union members live in California than anywhere else in the nation--a total of 2.5 million.³⁹⁶ Additionally, Californians generally supported strikers and avoided picket lines during the recent grocery strike.

There is also strong opposition to Wal-Mart in many local legislatures in California, so-called "site fights." For example in Inglewood, California, the City Council used zoning laws to block construction of a Wal-Mart supercenter and other "big box" retailers.³⁹⁷ Wal-Mart officials responded by going directly to the voters. In less than 20 days it gathered 22,000 signatures, more than twice the number required to get an initiative on a ballot, that forced the city council to schedule the initiative for a special election to bypass the city's planning commission and the city council.³⁹⁸

It was a hard-fought electoral campaign. The town was flooded with Wal-Mart-sponsored-television commercials, and even free doughnuts and taxi rides to the polls. Wal-Mart spent more than \$1 million on an election in which fewer than 12,000 people voted.³⁹⁹ Despite outspending supporters of the city zoning ordinance ten to one, Wal-Mart lost the election by a three to two margin.⁴⁰⁰ "It puts Wal-Mart on notice that L.A. County is not Arkansas," said Miguel Contreras of the Los Angeles County Federation of Labor.⁴⁰¹

³⁹⁶ Bureau of Labor Statistics Press Release, February 25, 2003, Union Members Summary.

³⁹⁷ Andy Fixmer, David Greenberg, *Wal-Mart, labor massing troops*, LOS ANGELES BUSINESS JOURNAL, December 15, 2003.

³⁹⁸ Andy Fixmer, David Greenberg, *Wal-Mart, labor massing troops*, LOS ANGELES BUSINESS JOURNAL, December 15, 2003.

³⁹⁹ Jessica Garrison, Abigail Goldman and David Pearson, *Wal-Mart to Push Southland Agenda*, LOS ANGELES TIMES, April 8, 2004.

⁴⁰⁰ Jessica Garrison, Abigail Goldman and David Pearson, *Wal-Mart to Push Southland Agenda*, LOS ANGELES TIMES, April 8, 2004.

⁴⁰¹ Jessica Garrison, Abigail Goldman and David Pearson, *Wal-Mart to Push Southland Agenda*, LOS ANGELES TIMES, April 8, 2004.

Wal-Mart's recent approach to the site fights is a drastic change from the days of Sam Walton when the retailer focused primarily on small towns.

(W)e have almost adopted the position that if some community, for whatever reason, doesn't want us in there, we aren't interested in going in and creating a fuss. I encourage us to walk away from this kind of trouble because there are just too many other good towns out there who do want us. Wal-Mart wants to go where it's wanted. - Sam Walton.⁴⁰²

The Inglewood election was the first one Wal-Mart has lost--voters previously supported the retailer in Calexico and Contra Costa County where the company persuaded voters to repeal prohibitions enacted by local officials.⁴⁰³

At least a dozen other California cities and counties have adopted zoning laws to keep out Wal-Mart supercenters and stores lack them.⁴⁰⁴ In Oakland, local officials passed an outright ban on supercenters. The San Diego Council is expected to debate a so-called "big box" ordinance in early 2004.

In Los Angeles, City Council members are wary of Wal-Mart. "We want people to realize that the 10 cents they may save on a jar of pickles could mean paying another \$5 in taxes for all the extra visits to the local emergency rooms," said Eric Garcetti, the Los Angeles Councilman proposing restrictions on Wal-Mart.⁴⁰⁵ The city attorney's office is drafting an ordinance expected to ban or severely limit development of supercenters.⁴⁰⁶

⁴⁰² SAM WALTON & JOHN HUEY, *MADE IN AMERICA, MY STORY*, 182-3 (1992).

⁴⁰³ Jessica Garrison, Abigail Goldman and David Pearson, *Wal-Mart to Push Southland Agenda*, LOS ANGELES TIMES, April 8, 2004.

⁴⁰⁴ Abigail Goldman and Nancy Cleeland, *The Wal-Mart Effect*, LOS ANGELES TIMES, November 25, 2003.

⁴⁰⁵ Rene Sanchez, *Los Angeles to Wal-Mart: Bigger's Not Always Better*, THE WASHINGTON POST, February 3, 2004, page A-3.

⁴⁰⁶ Andy Fixmer, David Greenberg, *Wal-Mart, labor massing troops*, LOS ANGELES BUSINESS JOURNAL, December 15, 2003.

A report commissioned by two Los Angeles City Councilmen warned that Wal-Mart's supercenters could harm the local economy and recommends that the company be required to raise its pay and benefits if it wants to operate in the city.⁴⁰⁷ The report says the sales tax benefits of big box stores to cities may be illusory, because the stores may take business from other retailers in the same community.⁴⁰⁸ A vote on a Los Angeles City Counsel prohibition on supercenters should take place in the summer of 2004.

These site fights are not the ultimate answer to the problems Wal-Mart presents, however. It is a strategy that can temporarily save union jobs and give labor leaders victories to celebrate, but it does little to stop the long-term march of Wal-Mart. There are 478 cities in California, 88 in Los Angeles County alone.⁴⁰⁹ Some of these local communities have approved of Wal-Mart supercenters, specifically in Northern California--Stockton, Redding and Chico.⁴¹⁰ However, the site fights, and the support they have received from the electorate to date, show that unionization has a better chance of success in California than anywhere else in the nation.

California is also the location where unions had success with the successful "Justice for Janitors" campaign. Instead of trying to organize particular providers of janitorial services, that union recognized that most service contracts turn over on a regular basis from one provider to another. So it decided to organize the buildings being served by the different janitorial services by using sit-ins, public demonstrations, appeals

⁴⁰⁷ Nancy Cleeland, *City Report is critical of Wal-Mart Supercenters*, LOS ANGELES TIMES, December 6, 2003.

⁴⁰⁸ Nancy Cleeland, *City Report is critical of Wal-Mart Supercenters*, LOS ANGELES TIMES, December 6, 2003.

⁴⁰⁹ Abigail Goldman and Nancy Cleeland, *The Wal-Mart Effect*, LOS ANGELES TIMES, November 25, 2003.

⁴¹⁰ Alan Zibel, *Grocery industry's labor woes are rooted in Wal-Mart expansion*, OAKLAND TRIBUNE, December 21, 2003.

to health and safety and wage and hour agencies, and other similar pressure tactics.

These corporate campaigns generated great success in Los Angeles.⁴¹¹

If UFCW were to unionize just a few Wal-Marts in California, a domino effect could follow in the rest of the nation. "Winning one store wall to wall would create a domino effect," said Leonard Purnell of UFCW. "It would show people, 'Hey, yes, it can be done.'"⁴¹² It is possible many Wal-Mart workers undoubtedly want a union, but none of them has stepped up to be the next Maurice Miller, the Wal-Mart meat cutter who helped UFCW win an election in Jacksonville, Texas. Al Zack, the lead strategizer of the union's Wal-Mart campaign, who works from UFCW headquarters in Washington, D.C., gives this a positive spin: "All they are waiting for is for someone else to go first."⁴¹³

5. Focus on Female, Minority and Elderly

UFCW should also focus on female, minority and elderly workers. AFL-CIO statistics indicate that unions prevail in 60-66 percent of labor board elections involving bargaining units comprised primarily of female or minority employees, or both.⁴¹⁴ The statistics from the discrimination lawsuit in California show that women are the ones treated most badly at Wal-Mart. Women work the majority of the low paying cashier jobs, and even if they do somehow get promoted, the statistics from that case show that Wal-Mart pays women less in every position in the company, even though they may have better performance evaluations than their male co-workers.⁴¹⁵ As older workers continue

⁴¹¹ Charles B. Craver, *Why Labor Unions Must (And Can) Survive*, 1 U. Pa. J. Lab. & Emp. L. 15, 17 (1998) (Citing John B. Judis, *Can Labor Come Back?*, THE NEW REPUBLIC, May 23, 1994, at 25.)

⁴¹² Adam Fifield, *She was fired from Wal-Mart for insubordination; A foot soldier's march to unionize*, THE PHILADELPHIA INQUIRER, December 26, 2003.

⁴¹³ Cora Daniels, *Unions vs. Wal-Mart*, FORTUNE, May 3, 2004.

⁴¹⁴ Charles B. Craver, *Why Labor Unions Must (And Can) Survive*, 1 U. Pa. J. Lab. & Emp. L. 15, 39 (1998) (Citing Union Tactics Found Key to Winning Elections 138 Lab. Rel. Rep. (BNA) 475 (Dec. 9, 1991) (citing the unpublished work of Professor Kate Bronfenbrenner)).

to work full-or part-time to supplement their retirement income, they, too, may respond to appropriate union organizing efforts.⁴¹⁶

6. Speak Up Loudly - The UFCW has recently adopted covert tactics in its efforts to organize Wal-Mart workers. "In the old days, we'd be chanting and protesting in the parking lot," says organizer Stan Fortune. "Now we are less confrontational and more covert." They have adopted this approach partly because they say Wal-Mart workers are too frightened to speak to them openly and partly because they do not want Wal-Mart to know the number of union card signers at any given store out of fears Wal-Mart will "pack" the unit to make sure the union loses the vote.⁴¹⁷ Even though Wal-Mart has a history of engaging in this type of anti-union tactic, the benefits of campaigning loudly outweigh the risks of Wal-Mart diluting union support by transferring employees.

The covert tactics simply are not working for UFCW in Las Vegas. They have yet to obtain more than 40 percent for authorization card signatures in any of the stores. It is time to abandon this tactic and let Wal-Mart employees know the potential benefits of unionization. The union also needs to get out and contact Wal-Mart employees at their homes. An AFL-CIO study found that unions prevail in 78 percent of elections in which regular house calls are made to target employees. By contrast, the union success rate is only 40 percent when communication is carried out primarily through telephone calls, and 39 percent when mass mailings are the primary source of communication.⁴¹⁸

⁴¹⁵ Dukes, et al. v. Wal-Mart Stores, Inc., No. CO1-2252 MJJ, United States District Court, N.D. California, Plaintiff's Class Action Brief, April 28, 2003.

⁴¹⁶ Charles B. Craver, *Why Labor Unions Must (And Can) Survive*, 1 U. Pa. J. Lab. & Emp. L. 15, 17 (1998) (Citing Union Tactics Found Key to Winning Elections, 138 Lab. Rel. Re. (BNA 475 (December 9, 1991))).

⁴¹⁷ Cora Daniels, *Unions vs. Wal-Mart*, FORTUNE, May 3, 2004.

⁴¹⁸ Charles B. Craver, *Why Labor Unions Must (And Can) Survive*, 1 U. Pa. J. Lab. & Emp. L. 15, 17 (1998) (Citing HOYT WHEELER & JOHN MCCLENDON, THE INDIVIDUAL DECISION TO UNIONIZE IN THE STATE OF THE UNIONS, 66 (1991)).

7. Focus on Worker Dissatisfaction - It appears Wal-Mart's employees may be realizing that Wal-Mart is not a great place to work and that their employer may not always have their best interests at heart. Tracking Wal-Mart's progress on the Fortune Magazine's "100 Best Companies to Work For" list provides some indication of employee satisfaction. Wal-Mart made its first appearance on the list in 1999 and was ranked number 66.⁴¹⁹ Wal-Mart did not make Fortune's list in 2000, but was ranked at number 80 in 2001.⁴²⁰ In 2002, the retail giant slipped to number 94,⁴²¹ and only made the list in large part to randomly selected employees who responded to such statements as "There is a family or team feeling here" with a rousing "yes."⁴²² 2002 was Wal-Mart's last appearance on the list of Best Companies to Work For. It did not make Fortune's cut in 2003 or 2004.⁴²³ This is a significant development for the unionization of Wal-Mart. Once the employees realize that change is needed, unions may finally be able to get a foothold.

8. Tell Wal-Mart Employees about Costco - If Wal-Mart employees hear that Costco employees who do the same job in the same town make higher wages and have better benefits, the choice to unionize will be clear. With only 432 stores, there is no threat of Costco stealing a significant number of Wal-Mart employees. However, when the Wal-Mart employees learn about a real world example, in the same industry, of how a union can work with a large retailer, it will make them realize that it is possible and that the benefits make unionization worthwhile.

⁴¹⁹ <http://www.fortune.com/fortune/bestcompanies/subs/1999/fulllist/0,19030,,00.html>, last visited 3/12/04.

⁴²⁰ <http://www.fortune.com/fortune/bestcompanies/subs/2001/fulllist/0,19032,,00.html>, last visited 3/12/04.

⁴²¹ <http://www.fortune.com/fortune/bestcompanies/subs/2002/fulllist/0,19033,,00.html>, last visited 3/12/04.

⁴²² Mark Gimein, *Wal-Mart—Sam Walton Made Us a Promise*, FORTUNE MAGAZINE, March 18, 2002.

⁴²³ <http://www.fortune.com/fortune/bestcompanies/subs/2003/fulllist/0,19034,,00.html>, last visited 3/12/04;
<http://www.fortune.com/fortune/bestcompanies/subs/2004/fulllist/0,19035,,00.html>, last visited 3/12/04.

9. Be patient - It will take time to organize Wal-Mart. "We know we are not going to have any immediate results," says Bill Meyer, a veteran UFCW organizer who leads the Las Vegas campaign. "But we are building a movement. Women's suffrage took decades; the civil rights movement took a century. We are looking at something similar with Wal-Mart." ⁴²⁴

Conclusion - Wal-Mart is selling out American workers. What started out as a great idea on how to run a retail store has turned into the world's largest company and the nation's largest employer. However, American workers are suffering from this success. Wal-Mart pays its employees poorly, makes health benefits unaffordable for many, and violates laws protecting worker's rights frequently. Traditional answers to the problems presented by Wal-Mart, like class action litigation, or actions before the NLRB have not been effective. The best way to improve conditions for workers at Wal-Mart, and all other service industry employees, is to unionize Wal-Mart. Through organization, these workers could enjoy a collective voice, a wage premium, and better benefits. The unionization of Wal-Mart is the only way to equalize the power imbalance between Wal-Mart and its employees.

"We can't just walk away and let Wal-Mart take over working America as we know it," said Peg Michalowski, the Wal-Mart coordinator for the union's Local 1360, based in West Berlin, Pennsylvania. If Wal-Mart expands unchecked, union officials say, it will threaten labor's livelihood and lead other companies in a "race to the bottom" of wages, benefits and worker treatment. Local organizers said they would keep trying to get a foothold. Representatives handed out cards at the store last week and will visit workers' homes. Michalowski said that even if the union did not prevail, it would still

⁴²⁴ Cora Daniels, *Unions vs. Wal-Mart*, FORTUNE, May 3, 2004.

have effect. "As long as we're campaigning, it keeps Wal-Mart accountable," she said.

"They're going to have to watch their p's and q's a lot more closely."⁴²⁵

⁴²⁵ Adam Fifield. *She was fired from Wal-Mart for insubordination; A foot soldier's march to unionize*, THE PHILADELPHIA INQUIRER, December 26, 2003.